Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

CLARDY MANUFACTURING COMPANY,

Petitioner,

vs.

MARINE MIDLAND BUSINESS LOANS, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a bench trial, the district court entered judgment for the Petitioner on one of several alternate theories of recovery and did not make findings of fact or conclusions of law on the remaining theories of recovery. The appellate court reversed and rendered judgment for the Respondent on the theory forming the basis of the district court's judgment and also made findings and rendered judgment for the Respondent on the alternate theories of recovery that the trial court did not address. The questions presented are:

1. Whether appellate resolution of alternate theories and claims is available as a remedy (a) when the claims depend on disputed facts that were not ruled on by the district court, and (b) when credibility choices must be made and inferences drawn by the finder of fact.

2. Whether a court of appeals' *de novo* resolution of fact issues (a) violates the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and (b) improperly usurps the function that the civil justice system reserves for finders of fact, whether district courts or juries.

PARTIES TO THE PROCEEDING

Petitioner

Clardy Manufacturing Company
1728 Layton
Forth Worth, Texas 76117
(817) 834-2267

Respondent

Marine Midland Business Loans, Inc.
One Marine Midland Center
Buffalo, New York 14203
(716) 841-2424

RULE 29.1 LISTING

Petitioner

Clardy Manufacturing Company has no corporate parent and has no corporate subsidiary that it does not wholly own.

Respondent

The parent company of respondent Marine Midland Business Loans, Inc. is:

HSBC Americas Inc.
One Marine Midland Center
Buffalo, New York 14203

The parent company of HSBC Americas Inc. is:

HSBC Holdings B V
Amsterdam, Netherlands

Marine Midland Business Loans, Inc. has a number of subsidiaries. Petitioner is unable to determine which of these companies are wholly owned subsidiaries. Accordingly, attached hereto as Appendix I is a complete listing of any and all subsidiaries of Marine Midland Business Loans, Inc. without any representations as to their ownership.

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Clardy Manufacturing Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra* 3a) is reported at 88 F.3d 346. The order overruling Clardy Manufacturing Co.'s Motion for Rehearing and Suggestion for Rehearing En Banc (App. *infra* 1a-2a) and the district court's opinion (App. *infra* 39a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 22, 1996 (App. *infra* 30a) and overruled Clardy Manufacturing Co.'s Motion for Rehearing and Suggestion for Rehearing En Banc on August 28, 1996 (App. *infra* 1a-2a). The jurisdiction of the court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner ("Clardy") sued Respondent ("Marine") under several alternate theories of recovery arising out of Marine's failure to make a loan to Clardy. After a five day bench trial, the district court issued an opinion awarding Clardy over $8 million in lost profit damages on a breach of contract theory. The district court did not rule on Clardy's alternate theories of recovery for fraud, negligent misrepresentation and promissory estoppel, but it did overrule Clardy's state statutory claim for an alleged deceptive trade practice.

The court of appeals reversed the judgment on Clardy's breach of contract claim and rendered judgment for Marine on

Clardy's common law claims for negligent and fraudulent misrepresentation and promissory estoppel.[1]

A. Proceedings Below

The district court found the crucial January 1992 letter agreement between Clardy and Marine to be ambiguous and construed it to be a contract that obligated Marine to issue a commitment letter and make a loan (App. *infra* 47a-48a). The district court found that obligation to depend upon Clardy's satisfaction of certain criteria set out in the agreement. Based on essentially undisputed evidence, the district court found that Clardy had satisfied the criteria, and that Marine's subsequent failure to fund the loan contemplated in the letter agreement was a breach of the contract (App. *infra* 48a).

Because that finding afforded complete relief, the district court made no findings regarding the alternate common law theories. (App. *infra* 49a).

The court of appeals reversed, finding that the January letter agreement was, in fact, unambiguous and that its unambiguous terms did not obligate Marine to fund a loan. It also declined to remand the case for findings on the common law claims, concluding that the record would not support a judgment based on those claims "as a matter of law" (App. *infra* 20a).

B. Outline Of Underlying Facts Necessary To Illustrate The Questions Presented.

The court of appeals found that Clardy offered evidence in

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1. The court of appeals also affirmed the district court's disposal of Clardy's statutory deceptive trade practice claim. That ruling, and the reversal of the district court's judgment on Clardy's contract claim, are not relevant to the issues presented by this Petition.

support of its alternative theories of recovery (App. *infra* 20a). Clardy is a family-owned business that makes after-market air conditioners for automobiles (App. *infra* 4a, 53a). Marine, a wholly-owned subsidiary of Hong Kong and Shanghi Bank Group consortium with assets over $3 billion, is an asset based lender that makes loans based on collateral and provides other cash management services to borrowers (App. *infra* 5a, 53a). John Clardy, Jr. ("Mr. Clardy") is the son of Clardy's founder and is its chief executive officer (App. *infra* 4a, 53a-54a). Michael Norvet was Marine's senior business development officer in its Dallas office (App. *infra* 5a, 54a-55a). Jim L. Ely was Marine's senior regional manager in Dallas (App. *infra* 5a). Kurt Putkonen was Marine's territorial manager in the Atlanta office, who temporarily assumed Ely's administrative responsibilities after Ely left Marine (App. *infra* 55a-57a).

1. The Loan Approval Misrepresentation

Norvet called Mr. Clardy in late 1991 to solicit his business as a potential borrower (App. *infra* 57a-58a). During his conversations with Mr. Clardy and others, Norvet told Mr. Clardy that approval for the loan would be made in Dallas by a senior credit manager, (App. *infra* 58a), and that the loan package would be reviewed at Marine's corporate headquarters for form and "rubber-stamp" approval (App. *infra* 59a).

The statements that the loan approval would be made locally were untrue. In fact, the approval process involved signatures from three individuals in Atlanta, Georgia and Buffalo, New York. No one in the Dallas office had authority to approve the loan (App. *infra* 59a-60a).

Mr. Clardy felt it was important for a relationship to exist between his business and the people making the decision (App. *infra* 61a-62a). Had he known about the actual approval process

before late March of 1992 (App. *infra* 60a-61a), he would not have pursued a loan from Marine, signed the January 1992 agreement, stopped looking for other financing, and paid the $25,000 fee the agreement required (*Id.*).

2. The Commitment Letter Misrepresentation

In February of 1992, Clardy had an opportunity to purchase products from an Australian company, Environmental Products Amalgamated ("EPA"), (App. *infra* 62a-63a), and to enter into a licensing agreement with EPA for the manufacture and sale of EPA-designed freon recovery technology (App. *infra* 63a). Mr. Clardy and Norvet discussed the EPA deal at length, (App. *infra* 63a-64a), but Mr. Clardy had no intention of signing the agreement unless the Marine loan came through (App. *infra* 64a).

On March 11, 1992, Norvet met with Mr. Clardy and Graeme McDougall, (App. *infra* 64a), the chairman and chief executive officer of EPA (App. *infra* 64a-65a). McDougall requested the meeting to determine the status of the Marine loan to Mr. Clardy (App. *infra* 65a). At the March 11, 1992 meeting, Norvet told Mr. Clardy and McDougall that Marine would issue a commitment letter in the next two to five days, (App. *infra* 65a-66a), because all of the documentation and the audits of Clardy performed by Marine looked good (App. *infra* 66a).

Based on Norvet's assurances at the meeting with Mr. Clardy and McDougall, Clardy and EPA signed the agreement (App. *infra* 67a-68a). Both Clardy and EPA relied on Norvet's representation about the commitment letter. McDougall consulted his Australian director and Japanese financiers and they all agreed that "when a bank makes that sort of statement that we were entitled to believe it. And on that basis, we should go ahead as a company and sign the contract with Clardy Manufacturing" (App. *infra* 67a-68a). However,

the commitment letter never issued and Marine's failure to fund created severe difficulties for both Clardy and EPA (App. *infra* 69a-71a).

3. The Court Of Appeals' Disposition Of The Alternate Theories Of Recovery.

In spite of undisputed evidence on some points, and factual disputes on others, the court of appeals held that all of Clardy's alternative common law claims "fail as a matter of law" (App. *infra* 20a).

Regarding the negligent misrepresentation claim, the court first misapplied Texas law by holding that Norvet's March 1992 promise that the commitment letter would issue in a day or two was not actionable. (App. *infra* 23a). The court held that the statement was a promise of future performance, under the authority of *Alpha Road v. NCNB Texas National Bank*, 879 F. Supp. 655 (N.D. Texas 1995), and was not actionable as a misrepresentation. The court incorrectly distinguished *Federal Land Bank Association of Tyler v. Sloane*, 825 S.W. 2d 439, 442 (Tex. 1991), in which the Texas Supreme Court held that a representation like Norvet's *was* actionable.

Next, the court of appeals found that Mr. Clardy's reliance on Norvet's March 1992 representation was unjustified as a matter of law (App. *infra* 24a-25a). It assumed that the statement was made as Clardy alleged, and then weighed evidence not addressed by the district court that supported and contradicted the reasonableness of Mr. Clardy's reliance, discredited the testimony of Mr. Clardy and McDougall, and found that Mr. Clardy's reliance was negligent (App. *infra* 25a). Finally, disregarding Norvet's own testimony to the contrary (App. *infra* 72a-73a), it found that there was no evidence that Norvet knew his statement was false when made. (App. *infra* 28a).

The court of appeals also held that Marine's misrepresentations about its credit approval process would not support a judgment in Clardy's favor solely because the court discredited Mr. Clardy's undisputed testimony that he relied upon those representations when he entered into the January 1992 letter agreement (App. *infra* 25a-27a). It also disregarded or discredited other evidence from Clardy and from Marine (App. *infra* 68a-69a) to hold that even if Mr. Clardy had relied on those representations, that reliance was unreasonable as a matter of law (App. *infra* 27a).

The court of appeals similarly disposed of Clardy's fraud claim based on the Norvet representations. It chose to ignore Norvet's testimony that the commitment letter was contingent upon activities that Norvet knew would not be completed within two or three days of the March 1992 meeting (App. *infra* 72a-73a). He also knew of the actual loan approval process and knew where the application stood in that process. Therefore when the court of appeals held that there was no evidence that Norvet knew his March 1992 misrepresentations were false when made (App. *infra* 28a); it weighed and disregarded significant evidence to the contrary. (App. *infra* 72a-73a).

Finally, the court of appeals disposed of Clardy's common law promissory estoppel claim by reiterating its fact determination that Mr. Clardy's reliance on the representations was unreasonable as a matter of law (App. *infra* 30a).

REASONS FOR GRANTING THE WRIT

The method used to reach the decision in this case fundamentally conflicts with the consistent acknowledgment by this Court of the importance of the fact finder's ability to personally judge the credibility of witnesses before choosing to either accept or disregard their testimony. *United States v. Oregon State Medical Society*, 343 U.S. 326, 329 (1952);

Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985); *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 500-01 (1984); and *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 215-17 (1947). It is also contrary to this Court's admonition that courts of appeal are not to "decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969).

As the Fifth Circuit itself recognized in *Pigrenet v. Boland Marine & Manufacturing Co.*, 631 F.2d 1190, 1191-2 (5th Cir. 1980), a manifest injustice occurs when a reviewing tribunal, whether it be an administrative law judge, a magistrate, or a court of appeals, disposes of a claim by making credibility determinations and resolving fact disputes on the basis of a paper record. The court of appeals did exactly what its own precedent considers a manifest injustice when it evaluated credibility, disregarded undisputed evidence and resolved fact disputes in order to dispose of Clardy's common law claims without remand.

The decision in this case also conflicts with authority from other circuits that have addressed the question of the propriety of appellate resolution of fact disputes and credibility choices. Prior opinions of this Court have given conflicting guidance to lower federal courts and this Court should clarify the law on this issue for the federal circuits to avoid confusion and inconsistent application.

The issue presented by this appeal also involves the administration of justice in the federal courts and the proper role of trial and appellate courts in the resolution of disputed facts. In making the findings it made, the court of appeals so departed from the appropriate course of judicial proceedings that this Court should exercise its power of supervision to correct the error. This Court has the ultimate responsibility for oversight of the function of federal courts, and this case calls for the exercise of that oversight to definitively clarify the appropriate

role of a court of appeals when addressing theories of recovery or defense that the district court declined to consider.

Also, original appellate resolution of disputed fact issues not addressed by the trial court operates to violate litigants' due process rights contained in the Fifth and Fourteenth Amendments to the United States Constitution. Such appellate court action deprives the losing litigant of the opportunity to be meaningfully heard on issues that may not have been fully developed in the appeal because of the district court's decision to make findings on only one issue. Further, original appellate findings of fact are essentially unreviewable because this Court does not and should not concern itself with error in particular cases. Thus, an erroneous resolution of a fact dispute or credibility determination by a court of appeals cannot be objectively reviewed, depriving litigants of the right to appeal contained in 28 U.S.C. §§ 41, 42, 1291 and 1294.

Finally, the decision below is erroneous.

I.

THE COURT OF APPEALS' DISPOSITION OF CLARDY'S COMMON LAW CLAIMS IS CONTRARY TO THIS COURT'S PRECEDENT.

In order to find that Clardy's common law theories failed as a matter of law, the court of appeals either disregarded testimonial evidence, some of which came from Marine's own witnesses, or found incredible uncontradicted testimony that was corroborated by other evidence. In short, the court of appeals usurped the fact finding function reserved for the district court, and improperly undertook that responsibility. That ruling conflicts with a long line of opinions from this Court recognizing the importance to the fact finder of direct exposure to the evidence it must weigh.

In its opinions, and in its adoption and construction of Rule 52(a) of the Federal Rules of Civil Procedure, this Court has consistently acknowledged that the trier of fact who has seen the witnesses and heard their testimony is peculiarly well situated to judge their credibility and thereby to either accept or reject their testimony. The language of Rule 52(a) itself requires appellate courts to give "due regard . . . to the opportunity of the trial court to judge the credibility of the witness," and forbids reversal unless the finding is "clearly erroneous" Fed. R. Civ. P. 52(a).

Giving effect to the recognition that findings of fact are best left to the tribunal that actually receives the evidence, this Court construed the "clearly erroneous" standard of review to be very exacting. *Id., United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The presumption that fact findings and credibility choices made by the trial court are correct is given even greater effect when the findings come, as here, after a complete trial on the merits. *Bose Corp. v. Consumers Union of United States Inc.*, 466 U.S. 485, 500-501 (1984).

This Court also recognized the value of the perspective of the trial judge who has personally viewed the testimony when weighing conflicting evidence or making credibility choices. It quoted from *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930) to observe that because of the exposure to living witnesses, "the original trier of the facts holds a position of advantage from which appellate judges are excluded. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." *Boyd v. Boyd*, 252 N.Y. at 429, 169 N.E. at 634, *cited in, United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952).

The unique suitability of the trial court to resolve fact issues and make credibility determinations has been recognized by this

Court in a number of contexts. *See e.g., Bose Corp., supra; Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *Oregon State Medical Society, supra; Zenith Radio Corp., supra.* For example, in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), this Court recognized that the discretion regarding whether to grant a new trial or enter a judgment notwithstanding the verdict must rest with the trial court. 330 U.S. at 215. It held that such discretion should be vested in "the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." 330 U.S. at 216.

This Court apparently contradicted this reasoning in *United States v. Generes*, 405 U.S. 93 (1972), a case involving the construction and application of the Internal Revenue Code and tax regulations. The issue involved the proper standard of proof of the relationship between a taxpayer and a business to which the taxpayer loaned money to determine the tax treatment of the failure of the business to repay the loan, 405 U.S. at 94-5. This Court reversed the judgment of the court below and remanded the case with instructions to enter a judgment for the United States notwithstanding an adverse verdict, 405 U.S. at 107, thus removing the case from the trier of fact. In so doing, this Court examined the evidence relating to the ultimate question of the taxpayer's motivations for making the loan and concluded that reasonable minds would not believe the taxpayer's testimony about his motivation. *Id.*

Generes should not state the law regarding the propriety of an appellate court's resolution of fact issues and credibility questions not passed upon by the trier of fact. First, *Generes* was consistent with existing precedent, because a witness need not be believed if his testimony is internally inconsistent or in conflict with clearly authentic documentary or other equally certain evidence. *See e.g., Winchester Packaging Inc. v. Mobil Chemical Co.*, 14 F.3d 316, 319 (7th Cir. 1994). Unlike this

case, the *Generes* Court found the discredited testimony to be internally inconsistent and refuted by undisputable facts relating to income before and after taxes. 405 U.S. at 106-107.

Second, to the extent *Generes* does conflict with the principles enunciated in *United States v. Oregon State Medical Society* and its progeny, it has been implicitly superseded by this Court's opinion in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). Reversing a court of appeals' application of the "clearly erroneous" standard of review, this Court again emphasized the enhanced deference given to a trial court's findings, acknowledging that "only the trial judge can be aware of the variations in demeanor and tone that bear so heavily on the listeners understanding of and belief in what is said." 470 U.S. at 575.

Finally, *Generes* is suspect as this Court's definitive statement on the question. The issue of the propriety of appellate fact finding was not raised as a point for this Court to address in *Generes*. Further, only four members of this Court approved of the disposition of the case. While Justice White joined the analysis of the tax issue presented, he vigorously dissented from the ultimate disposition in an opinion joined by Justice Brennan. He noted that the plurality's decision to order judgment in favor of the United States was inconsistent with the Court's position that the trial court is the most appropriate place to resolve fact issues that the plurality resolved, "since appellate courts are awkwardly equipped to resolve such issues. . . ." 405 U.S. at 113 (White, J. dissenting). Justices Douglas also dissented, and Justices Powell and Renquist did not participate in the decision.

Thus, while *Generes* at least implicitly expresses this Court's view that appellate courts can resolve fact issues and make credibility determinations in the first instance, this Court was far from unanimous in that view. Further, Justices White

and Brennan noted the conflict between *Generes* and this Court's consistent position regarding the appropriate role of trial and appellate courts as exemplified by *Cone*; *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933), *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 253 (1940), and recently recognized in *Anderson* and *Zenith Radio Corp.* That conflict remains to be resolved.

When this Court has addressed or alluded to the question presented by this Petition, it has reasoned in a manner that casts doubt on the propriety of the court of appeals' disposition of this case. In almost every case in which this Court discussed the fitness of an appellate court to resolve fact disputes and make credibility determinations, the situation has involved an appellate court reversal of trial court findings. *See e.g., Anderson*, 470 U.S. at 566. However, this Court has not addressed these issues when, as here, the appellate court made findings that the trial court had not yet made. Consistently with this Court's frequent recognition of the superior position of a trial judge to evaluate and weigh the evidence, and its observation that an appellate court's "function is not to decide factual issues de novo . . ." *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969), this Court should grant this petition to provide definitive guidance to the lower federal courts regarding the appropriate tribunal for the resolution of fact disputes and the evaluation of witness credibility. In this case, the Court can and should firmly establish that the law places that initial responsibility on the trial court or jury.

II.

THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING THE PROPRIETY OF ORIGINAL APPELLATE RESOLUTION OF FACTUAL DISPUTES AND CREDIBILITY DETERMINATION.

When the Fifth Circuit resolved the disputed fact issues, made credibility determinations of its own, and rendered judgment in favor of Marine on those claims, it contradicted the prevailing law of almost every other federal circuit.

Other circuits hold or imply that an appellate court is ill-suited to make credibility choices and should not resolve fact issues in the first instance based upon a paper record.[2]

The Seventh and Eleventh Circuits have explicitly held that appellate courts cannot make credibility determinations when testimony is not contradicted by irrefutable evidence.

> *[W]e have no power to resolve issues of credibility* unless a witness's testimony is "seriously inconsistent internally, or contrary to establish laws of nature or otherwise fantastic, or irreconcilably in conflict with indubitable documentary or physical evidence, stipulations of fact, admissions, or evidence of equivalent certainty."

Winchester Packaging, Inc. v. Mobil Chem. Co., 14 F.3d 316,

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2. *See e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75, 105 S.Ct. 1504, 1511-12, 84 L. Ed. 2d 518 (1985); *Caban-Wheeler v. Elsea*, 71 F.3d 837, 843 (11th Cir. 1996); *Winchester Packaging, Inc. v. Mobil Chem. Co.*, 14 F.3d 316, 319 (7th Cir. 1994); *Favors v. Fisher*, 13 F.3d 1235, 1238 (8th Cir. 1994). For a complete listing of similar holdings, *see* Appendix H.

319 (7th Cir. 1994), *quoting Bullard v. Sereon Corp.*, 846 F.2d 463, 466 (7th Cir. 1988) (emphasis added). The Eleventh Circuit writes, "Resolving such credibility determinations is, of course, beyond the purview of the appellate courts." *Walker v. NationsBank of Florida, N.A.*, 53 F.3d 1548, 1557 (11th Cir. 1995).

The federal circuits almost unanimously endorse the proposition that an observer of a witness is uniquely suited to make credibility judgments because of the opportunity to "be aware of the variations and demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518, 529 (1985); *Caban-Wheeler v. Elsea*, 71 F.3d 837, 843 (11th Cir. 1996).

Describing the importance of first-hand exposure to witnesses and evidence to the accuracy of the fact finding process, the other federal circuits generally agree that appellate courts simply lack "the critical first-hand impressions" that the triers of fact possess. *United States v. Brown*, 821 F.2d 986, 989 (4th Cir. 1987). *See e.g., Maher v. Harris Trust & Sav. Bank*, 75 F.3d 1182, 1189 (7th Cir. 1996), *Complaint of Nautilus Motor Tank Co., Ltd.*, 85 F.3d 105, 116 (3rd Cir. 1996).

In this case, the Fifth Circuit made its own credibility choices that disposed of Clardy's common law claims. It held that no one would believe Mr. Clardy's testimony that he relied on Marine's misrepresentations about the details and timing of its loan approval process (App. *infra* 25a-27a). The court must have held incredible, or disregarded Graeme McDougall's testimony that he, his other Australian directors, and his Japanese financiers relied on Norvet's March 11, 1992 misrepresentations, (App. *infra* 67a-68a) and that McDougall insisted on the closure of the deal by March 13, when it found that Mr. Clardy's reliance

was not justified as a matter of law. (App. *infra* 24a-30a). Finally, in disregarding Norvet's own testimony indicating that he knew his March 11, 1992 misrepresentations were false when made (App. *infra* 72a-73a), the Fifth Circuit must have held that testimony to be incredible — or overlooked it completely — when it found that there was no such evidence in the record (App. *infra* 28a).

Those credibility choices should have been made by the district court who saw and heard the witnesses because the testimony was not internally inconsistent, and it was not contradicted by irrefutable evidence. The principle implicit in the court of appeals' opinion that an appellate court is free to resolve fact issues and disregard evidence is contrary to the law as stated or implied in virtually every other circuit. It directly conflicts with the Seventh and Eleventh Circuit holdings in *Winchester Packaging* and *Walker*, respectively. This Court should grant this petition to impose uniformity on this issue in the federal circuits.

III.

THE PROPER ADMINISTRATION OF JUSTICE REQUIRES THAT FACTS BE FOUND, AND CREDIBILITY DETERMINATIONS BE MADE BY THE TRIAL COURTS.

This court has long since assumed supervisory authority over the federal courts with the implied duty of "establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 340 (1943); *Hobby v. United States*, 468 U.S. 339, 349 (1984). While this obligation has been explicitly recognized in criminal cases, *see, e.g.*, *McNabb*; *United States v. Hale*, 422 U.S. 171, 181 (1975), the duty is no less applicable in matters involving the need to

construe and apply Rules of Civil Procedure. *See e.g., Cone v. West Virginia Pulp & Paper Co., supra* (construing Fed. R. Civ. P. 50(b)); *Anderson v. City of Bessemer City, supra* and *United States v. Marine Bancorporation,* 418 U.S. 602, 615 n. 13 (1974) (giving guidance to district courts regarding findings of fact made under Fed. R. Civ. P. 52(a)); Rule 10(a) of the Rules of the Supreme Court of the United States.

This case raises an issue that calls for this Court to exercise that supervisory authority. As discussed above, the clearly erroneous standard of review in Rule 52(a) embodies a philosophy this Court has frequently recognized and applied. Facts should be found, fact disputes should be resolved, and decisions based on credibility determinations should be made by the tribunal that actually receives the evidence in the first instance. It is only when an appellate court is required to evaluate or give effect to testimony that is contradicted by indisputable documentary evidence, or is internally inconsistent or contrary to the laws of nature, that it can resolve a fact issue upon which the district court has not passed. *See e.g., Winchester Packaging, Inc., supra*, 15 F.3d at 319.

In *Zenith Radio Corp., supra*, this Court observed that appellate courts' "function is not to decide factual issues de novo." 395 U.S. at 123. The court of appeals' de novo resolution of disputed fact issues in its judgment on Clardy's common law claims (*see* pp. 5-6, 15 *supra*) so far departs from the appropriate role of an appellate court that this Court described in *Zenith Radio Corp.* that it must be corrected. Indeed, the court of appeals trod so heavily on Clardy's right to have its case evaluated by the tribunal most qualified to do so, that the decision amounts to a denial of Clardy's Fifth and Fourteenth Amendment right to due process of law. This Court should exercise its supervisory powers, correct the court of appeals' inappropriate de novo fact finding, and provide clear guidance to the federal

appellate courts regarding their role in the administration of justice in the federal system.

IV.

APPELLATE RESOLUTION OF FACT DISPUTES AND CREDIBILITY DETERMINATIONS VIOLATES THE DUE PROCESS GUARANTEES IN THE FIFTH AND FOURTEENTH AMENDMENTS.

When an appellate court resolves fact disputes, and makes credibility determinations that permit it to make a no evidence finding in support of a judgment on issues the trial court did not consider, those rulings, if erroneous, are essentially unreviewable. The losing party's only recourse of right is a motion for rehearing before the same panel. A party may also make a suggestion for rehearing en banc, but that review is a matter of discretion, not of right. Fed. R. App. P. 40, 35. A litigant like Clardy has the right to petition to this Court for certiorari review of the court of appeals decision, but no right to this Court's review because this Court does not and should not concern itself with review of factual error in specific cases.

Thus, when a court of appeals takes on the task of a trial court and addresses fact issues the district court did not address, there is no realistic avenue by which the losing litigant can seek review of those findings or resulting judgments. There is no effective mechanism by which error can be remedied and there is no process by which arbitrary and capricious appellate rulings can be corrected. That lack of recourse denies litigants the procedural due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

A. The Statutory Right To Appellate Review Involves Due Process Considerations.

Article III Section I of the Constitution grants Congress the power to create courts inferior to this Court. In 28 U.S.C. §§ 41, 43, Congress created the courts of appeals and gave them jurisdiction over appeals taken from district courts in the respective federal districts in 28 U.S.C. §§ 1291, 1294. By creating the courts of appeals and vesting in them jurisdiction over all appeals taken from reviewable decisions of the district courts, Congress created and vested in federal litigants a right to appellate review of adverse decisions. While the appellate review of fact findings by district courts is limited by Fed. R. Civ. P. 52(a), it is nonetheless available to litigants who believe that the district court incorrectly weighed or evaluated the evidence it received during the trial. That statutorily created right is cognizable as an interest protected by the due process guarantees contained in the Fifth and Fourteenth Amendments.

While not constitutionally based, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333-334 (1980), the right to appeal that Congress created *is* guaranteed by constitutional notions of due process to preserve a "substantial right to redress by some effective procedure." *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). The lack of any real opportunity to seek appellate review of erroneous original appellate resolution of fact disputes deprives litigants of the right to an effective procedure to seek redress that the Constitution guarantees. In short, once Congress has created the right to appeal it must be effective and available to all litigants, equally and fairly. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). It cannot be constitutionally withheld from parties to cases in which the trial court did not rule on alternate theories of recovery that an appellate court chose to resolve rather than remand.

B. Original Appellate Fact Finding Deprives Litigants Of Their Right To Appeal Without Due Process.

This Court has repeatedly held that the essence of due process, as it relates to the administration of justice, is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 . . . (1965)" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). *See also Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 321 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

A motion for panel rehearing is not a meaningful opportunity for review for due process purposes because the essence of appellate review involves an objective look at the merits of a judgment by a tribunal not involved in the initial rendition of that judgment. An opportunity to seek a rehearing by the same tribunal that found the facts and rendered the judgment initially simply cannot satisfy the right to appellate review that Congress created. Otherwise the availability of motions for new trial or motions to correct, modify, or reform the judgment would have permitted Congress to avoid creating the Federal Circuit courts at all.

Neither is the opportunity to seek rehearing by the circuit sitting en banc a constitutionally or statutorily satisfactory protection of that right. In the Fifth Circuit, for example, rehearing en banc is extremely rare. In 1992, the Fifth Circuit granted only 9 out of 173 suggestions for rehearing en banc and in 1993, the circuit granted only 8 out of 220 suggestions, 4 of which were on the court's own motion. Gabriel & Powell, *Federal Appellate Practice Guide — Fifth Circuit* § 9:5 at p. 9-3 (1996). Further, a rehearing en banc is a matter of discretion, not of right. Thus, rehearing en banc is a more theoretical than real possibility and, because it is discretionary, it is certainly

not the opportunity to be meaningfully heard that this Court described in *Mathews*, 424 U.S. at 333.

C. Original Appellate Fact Finding Deprives Litigants Of Their Right To Be Heard At All.

The essence of due process protection is the right to be heard in some meaningful manner, *Logan* 455 U.S. at 433. Litigants rely on a district court's decision when framing their appellate arguments on the trial court's dispositive issues. Appellate fact issue resolution violates due process because it deprives litigants of the opportunity to be heard on those findings, made non-essential by the findings the trial court *does* make.

While it was not preserved and therefore was not addressed, this Court recognized this issue in *Helis v. Ward*, 308 U.S. 365 (1939). In that case, the court of appeals reversed and rendered judgment on an interpretation of a contract different from the trial court's interpretation. The case was tried by both sides on the interpretation the district court recognized, and the Petitioner complained that he was not permitted to be heard on the accuracy of an umpire's report which was crucial to the judgment because its accuracy was not an issue under the theory upon which the case was tried. *Helis* at p. 369-370.

This Court declined to rule on that point in *Helis* because it was not preserved, but essentially the same problem was preserved and is presented here. None of the findings necessary to the issue that the district court did address in this case were relevant to the common law claims that it did not resolve. Therefore, Clardy did not have a complete opportunity to be heard on the issues relating to the common law claims because those were not involved in the original appeal. In essence, Clardy was deprived of that basic due process guarantee.

Any litigant against whom a court of appeals renders judgment that requires resolution of fact issues not addressed by the trial court is potentially exposed to the same constitutional injury. Such litigants would be required, in that circumstance, to ask the district court to make findings and conclusions on alternate issues, which the courts may not be inclined to do, or face the possibility of an adverse judgment from which appellate review is impossible. Alternatively, litigants will be required to clutter the appellate record with argument and fact analysis not material to the issue the trial court did rule upon, for the sole purpose of ensuring a full hearing on those issues, without knowing whether such an effort is even necessary.

In sum, when appellate litigants reasonably rely on the trial court's analysis of a case when framing their arguments on appeal, they are deprived of the right to be heard on issues not resolved by the trial court, when those issues are addressed for the first time by the court of appeals. That circumstance deprives litigants of their due process rights, and this Court should definitively address the issue.

V.

THE COURT OF APPEALS' DECISION WAS ERRONEOUS.

In addition to the improper fact finding and credibility choices that the court of appeals made to dispose of the common law claims, the court below erroneously misapplied the law of negligent misrepresentation in the few legal rulings the court did make. Thus, to the extent that the court of appeals' judgment relied on those legal rulings, it was erroneous.

A. Norvet's March 11, 1992 Misrepresentation Is Actionable.

The court of appeals' holding that Norvet's March 11, 1992 statements about the imminent issuance of a commitment letter were not actionable as a negligent misrepresentation misconstrues and misapplies law from both the Fifth Circuit and from Texas courts. Relying upon *Alpha Road v. NCNB Texas National Bank*, 879 F. Supp. 655 (N.D. Tex. 1995), the court of appeals held that the misrepresentation was not actionable because Norvet's statement was a misstatement as to a future action by Marine rather than an existing fact. That legal analysis is incorrect because the court below and the court in the *Alpha Road* case failed to follow precedent from the Fifth Circuit in *Gibraltar Savings v. LDBrinkman Corp.*, 860 F.2d 1275, 1301-02 (5th Cir. 1988) and because of a recent Texas court of appeals' opinion, *Maginn v. Norwest Mortgage Inc.*, 919 S.W. 2d 164 (Tex. App. — Austin 1996, no writ) which construes *Federal Land Bank Association of Tyler v. Sloane*, 825 S.W. 2d 439 (Tex. 1991).[3]

Under *Sloane*, *Maginn*, and *Gibraltar*, the Norvet misrepresentation was actionable, and the panel decision on this issue was erroneous.

B. Marine's Failure To Disclose Is Actionable.

The court also dismissed Clardy's negligent misrepresentation claim based on Marine's failure to disclose certain changes in its approval process that were taking place in late 1991 and early 1992. The court found that there was no duty to disclose this information to Clardy (App. *infra* 26a

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3. The panel felt it necessary to distinguish *Sloane* from these facts to reach its decision on the actionability of Norvet's misrepresentations (App. *infra* 22a), relying instead on the facts in *Alpha Road, supra*, which are themselves distinguishable from the facts in this case.

n. 21). While it may be true that there is no duty to disclose such information in the absence of a confidential relationship, there is a duty, when such information is offered, to be accurate and not to mislead by omission. *Southeastern Financial Corp. v. United Merchants & Manufacturers, Inc.*, 701 F.2d 565, 566 (5th Cir. 1983). Inaccuracy can be actionable fraud. *Rubenstein v. Collins*, 20 F.3d 160, 171-72 (5th Cir. 1994). Marine itself recognized that it is important to most borrowers to be aware of the credit approval process as a part of the negotiating process and that it was important to Clardy (App. *infra* 68a-69a). There is evidence to support Clardy's claim that incorrect information was given about Marine's credit approval process and that the information was never corrected. Therefore, Clardy's fraud claim was not subject to dismissal as a matter of law.

VI.

THE QUESTIONS PRESENTED ARE IMPORTANT.

The questions raised by this case permit no middle ground. When substantial evidence on both sides of a dispositive fact issue must be weighed, or when uncontradicted testimony must be given effect or disregarded on credibility grounds, the courts of appeal are either appropriate tribunals to make those determinations or they are not. The circuits conflict, and this Court has yet to express a clear position on the issue.

It is an important question to answer because fact findings and credibility determinations made by appellate courts are, as discussed, essentially unreviewable given the necessary restrictions on the questions over which this Court should exercise certiorari review. That problem, coupled with the unlikelihood that the panel making the erroneous findings will grant a motion for rehearing and the rarity with which

suggestions for discretionary rehearing en banc are granted[4], precludes review of error committed in the first instance by the court of appeals. When a court of appeals resolves a fact issue for the first time on appeal, that finding is effectively beyond review. That amounts to a denial of due process to the litigant.

This Court granted certiorari in *Helis v. Ward* to consider an issue very similar to the question presented here, but later discovered that the point was not properly preserved. *Id.* The question raised in *Helis*, which was important enough to grant certiorari review, is involved here, and it is a question that this Court should finally resolve.

Also, the Fifth Circuit is in conflict with the remaining circuits about the point at which an appellate court can dispose of claims not ruled upon by the trial court consistent with the appropriate function of appellate courts and the due process principles embodied in the Fifth and Fourteenth Amendments to the United States Constitution, and this Court should definitively resolve that conflict.

This Court has often recognized that direct exposure to the evidence is essential to the accuracy of fact findings. However, with *Generes*, this Court has perhaps contributed to the confusion regarding exactly what kinds of fact disputes may be resolved in the first instance by courts of appeals and exactly what kind of evidence is necessary to permit an appellate court to find uncontradicted testimony of intent so incredible that it can be disregarded on the basis of a paper record.

In *Helis v. Ward* and *Saunders v. Shaw*, 244 U.S. 317 (1939)

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4. Richard E. Windhorst, Jr., *Judicial Business of the United States Court of Appeals for the Fifth Circuit* (1993); Report, Judicial Workload Statistics (1992), *cited in, Gabriel v. Powell, supra*, § 9:5 at p. 9-3.

this Court addressed, or was unable to address questions closely related to the issue presented today. However, this Court has not squarely resolved whether an appellate court can render judgment based on its original resolution of disputed facts without violating the proper procedural standards embodied in the Federal Rules of Civil Procedure and the procedural due process requirements embodied in the Fourteenth Amendment to the United States Constitution.

In sum, there is no definitive guidance from this Court on a question that has created confusion in the circuits and an absence of certainty and consistency to which litigants like Clardy are owed by our system of justice. Under the current state of the law on the subject of appellate resolution of fact issue, parties like Clardy can be unfairly and unconstitutionally deprived of any opportunity for review of an appellate court's original fact finding. Our system is predicated, in part, on the accuracy that personal exposure to the evidence lends to the resolution of factual disputes. This case presents this Court with an opportunity to clarify this area of the law and to bring uniformity upon which litigants can rely when evaluating how to present their disputes to federal district court. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 28, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10688

CLARDY MANUFACTURING COMPANY

Plaintiff-Appellee-Cross-Appellant

v.

MARINE MIDLAND BUSINESS LOANS INC

Defendant-Appellant-Cross-Appellee

and

JIM L ELY

Movant

Appeals from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 7/22/96, 5 Cir., 1996, ___ F.3d ___)

(August 28, 1996)

Appendix A

Before WISDOM, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Emilio M. Garza
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JULY 22, 1996

CLARDY MANUFACTURING COMPANY,
Plaintiff-Appellee/Cross- Appellant,

v.

MARINE MIDLAND BUSINESS LOANS INC,
Defendant-Appellant/Cross-Appellee,

and

Jim L. Ely, Movant.

No. 95-10688.

United States Court of Appeals,
Fifth Circuit.

July 22, 1996.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, EMILIO M. GARZA and PARKER, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Plaintiff Clardy Manufacturing Company ("Clardy Manufacturing") sued Marine Midland Business Loans, Inc. ("Marine"), alleging that Marine breached its commitment to

lend under a satisfaction contract. Following a bench trial, the district court concluded that Marine had obligated itself to make a loan to Clardy Manufacturing under the satisfaction contract once certain creditworthiness criteria had been satisfied and awarded damages in favor of Clardy Manufacturing. Marine now appeals. Clardy Manufacturing cross-appeals the district court's denial of its claim under the Texas Deceptive Trade Practices Act ("DTPA") and the district court's failure to consider its alternative common law claims for fraudulent misrepresentation, negligent misrepresentation, and promissory estoppel. Concluding that there was no satisfaction contract obligating Marine to make a loan, and that Clardy Manufacturing's remaining claims fail as a matter of law, we reverse in part, affirm in part, and render judgment in favor of Marine.

I

Clardy Manufacturing Company is a family owned business that makes and sells after-market air conditioners for automobiles. In 1989, John Clardy, Jr., began looking for new financing for the company, primarily in order to purchase the shares of the company's retiring founder, his father John Clardy, Sr., and thereby take over ownership of the company. The company also needed financing in order to effect a merger with Premier Parts, Inc.,[1] to refinance its existing debt, and to obtain additional working capital.[2] Clardy Manufacturing

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1. Premier Air Parts, Inc., which was also in the after-market air conditioner business, sold air conditioner parts to customers of Clardy Manufacturing and its competitors.

2. On sales of nearly $16 million in 1989, the company suffered a loss of $663,000.

unsuccessfully sought financing from at least six different lenders. The company was eventually referred to Marine, an asset-based lender with an office in Dallas, Texas. In contrast to a commercial bank, which primarily makes loans based on a company's cash flow, an asset-based lender like Marine makes loans on the basis of a company's collateral.

In the middle of 1990, Clardy Manufacturing discussed a potential loan with Michael Norvet, the senior business development officer for Marine's Dallas office. After Clardy Manufacturing submitted some preliminary financial information, Norvet informed the company that it did not meet Marine's minimum loan requirements. Discussions resumed, however, in the fall of 1991, after Marine reduced its minimum loan requirements from $5 million to $3 million. Clardy Manufacturing had not yet been able to secure financing, and John Clardy, Jr., and Norvet discussed the possibility of a $4 million loan. John Clardy, Jr., provided Norvet with additional financial information about the company, and he also completed Marine's pre-loan questionnaire and submitted the required financial projections.

In early January 1992, representatives from Clardy Manufacturing and Marine met in Dallas, to discuss the loan application. John Clardy, Jr., arrived with Richard Berman, the President of Premier Air Parts. Norvet introduced the two men to Jim Ely, Marine's senior regional manager of the Dallas office, and Frank Mederos, Marine's national marketing director. There was conflicting evidence presented at trial regarding what exactly the Marine representatives told John Clardy, Jr., and Berman regarding Marine's credit approval process. Nevertheless, the parties agree that at the close of the meeting, Mederos authorized the issuance of a proposal letter,

which would permit Marine to proceed further in evaluating Clardy Manufacturing's loan application. Accordingly, at another meeting ten days later, a proposal letter, or letter agreement, was signed by John Clardy, Jr., and Norvet. Clardy Manufacturing argues that this letter constituted a "satisfaction contract," while Marine, on the other hand, contends that it was merely an agreement to undertake due diligence.

Marine proceeded to conduct due diligence aimed at evaluating the financial health of Clardy Manufacturing, as well as the company's collateral that would form the basis for the $4 million loan. As part of this effort, Marine had appraisals made of Clardy Manufacturing's real property, inventory, and equipment. Marine's auditors also conducted a field examination of Clardy Manufacturing's books and records. In April of 1992, the resulting due diligence information was analyzed by David Boyd, the senior officer at Marine's Dallas office. Boyd's responsibility was to generate the "PCREF," Marine's computer generated, credit evaluation form. Based on the computer analysis, Boyd concluded that Clardy Manufacturing did not meet all of Marine's credit approval requirements, and as a consequence the loan application would have to go through an additional level of home office approval. Nevertheless, Boyd, who did not have any credit approval authority, recommended that the loan be approved.

Clardy Manufacturing's loan application and the PCREF results were then reviewed by Kurt Putkonen, who was administrative vice-president and territory manager for Marine. Putkonen also had no credit approval authority. After making an independent evaluation of the loan documents, Putkonen decided not to recommend to the home office that

Clardy Manufacturing's loan application be approved,[3] and in the middle of June 1992, Norvet communicated to John Clardy, Jr. that the credit approval process had come to an end.

In the middle of March 1992, while Marine was still conducting due diligence, John Clardy, Jr., introduced Norvet at a lunch meeting to Graeme McDougall, the Chairman of Environmental Products Amalgamated ("Environmental Products"), an Australian company that sold freon recovery and recycling equipment. John Clardy, Jr., was considering entering into a licencing agreement with Environmental Products. Although the Environmental Products deal was not part of the proposed Marine loan package, Berman testified at trial that Clardy Manufacturing, as a matter of priorities, was not going to enter into the Environmental Products deal unless the Marine loan was approved. At this lunch meeting, Norvet is alleged to have assured John Clardy, Jr., and McDougall that a "commitment letter" would be issued within the next two to five days, or in other words, that the loan would be approved within a matter of days. John Clardy, Jr., claims that based on this assurance, he entered into the contemplated licensing agreement with Environmental Products two days later. According to Clardy Manufacturing, Marine's failure to approve the loan made it impossible for the company to make

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3. Putkonen explained at trial that he had been concerned about the company's history of losses during the previous three years, that the company was significantly behind in its current year plan, that there were potential problems with dilution of the company's accounts receivable collateral, and that the company was just beginning to implement a perpetual inventory system, which Marine considered critical to Clardy Manufacturing's slow-moving inventory. Putkonen also noted that only a small portion of the loan would be going towards additional working capital, and the rest would be used for "non-growth" business purposes such as buying the stock of John Clardy, Sr., and paying off existing debt.

timely payments as called for in the Environmental Products licencing agreement.

Clardy Manufacturing eventually brought suit against Marine alleging breach of contract, fraudulent misrepresentation, negligent misrepresentation, and promissory estoppel. After a bench trial, the district court awarded Clardy Manufacturing $8,111,467 on its breach of contract claim, rejected the DTPA claim, and declined to consider Clardy Manufacturing's alternative common law theories of recovery. Marine appeals from the award of damages, and Clardy Manufacturing cross-appeals from the district court's denial of its DTPA claim and failure to consider its alternative common law claims.

II

A

Marine contends that the district court erred in concluding that the January 1992 letter agreement was a satisfaction contract. The interpretation of an unambiguous contract is a question of law which we review *de novo*. *Guidry v. Halliburton Geophysical Servs., Inc.*, 976 F.2d 938, 940 (5th Cir.1992). However, when a contract is ambiguous and its construction turns on the consideration of extrinsic evidence, we review the district court's interpretation for clear error only. *Id.* The initial determination that a contract is *ambiguous*, such that its interpretation warrants the consideration of extrinsic evidence, is itself a legal conclusion subject to *de novo* review. *Id.* We look to state law to provide the rules of contract interpretation. *Matter of Haber Oil Co., Inc.*, 12 F.3d 426, 443 (5th Cir.1994).

Appendix B

Under Texas law, a contract is ambiguous if, after applying established rules of interpretation, the written instrument "remains reasonably susceptible to more than one meaning," *R & P Enterprises v. LaGuarta, Gavrel & Kirk*, 596 S.W.2d 517, 519 (Tex.1980); *see also Towers of Texas, Inc. v. J & J Systems, Inc.*, 834 S.W.2d 1, 2 (Tex.1992) ("A written instrument is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning, taking into consideration the circumstances present when the instrument was executed."); *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex.1979) (requiring a "genuine uncertainty" as to which of two meanings is proper). On the other hand, if a contract is worded so that a court can giveit a certain or definite legal meaning or interpretation, it is not ambiguous. *R & P Enterprises*, 596 S.W.2d at 519. Where the contract is unambiguous, extrinsic evidence "will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 157 (1951); *Lewis v. East Texas Finance Co.*, 136 Tex. 149, 146 S.W.2d 977, 980 (1941).

We must enforce the unambiguous language in a contract as written, and the applicable standard is "the objective intent" evidenced by the language used, rather than the subjective intent of the parties. *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex.1981). In determining whether the language of the contract is unambiguous, however, we "should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983) (emphasis in original). Furthermore, "[n]o single provision taken alone will be given

controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Id.* With these rules of construction in mind, we turn now to the January 1992 letter agreement between Clardy Manufacturing and Marine.

B

The letter agreement begins by stating that its purpose is to "set forth the financial accommodations that Marine would be willing to consider in addressing CM's [Clardy Manufacturing's] financial needs." The letter proceeds to describe these financial accommodations, or "Credit Facilities," in some detail: "Marine would consider offering CM a 3 year revolving credit facility";[4] "Marine would consider offering the Company a 3 year term loan facility."[5] The letter states when the "Credit Facility" and "Term Loan" would be repayable, what interest would be applicable to the principle outstanding, how collections would be processed, and what secured interests in collateral and personal guarantees would be

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4. Under the "Revolving Credit" line, Marine stated that it would consider offering advances in an aggregate principal amount at any time outstanding equal to the lesser of $3 million, or up to eighty percent (80%) of the company's eligible accounts receivable plus up to fifty percent (50%) of the lower of cost or market value of Clardy Manufacturing's eligible finished goods inventory, but that in no event would inventory advances exceed $1 million.

5. Under the "Term Loan," Marine stated that the loan would be in a principle amount equal to the lesser of $1 million or *the sum of* (i) up to sixty percent (60%) of the auction value of the Company's eligible machinery and equipment *and* (ii) up to fifty percent (50%) of the fair market value of the Company's real property.

required.[6] Under the heading "*Fees: Prepayment Premium*" the letter states, "If the Credit Facilities are approved and funded, CM would be required to pay to Marine" certain origination fees and unused line fees. The letter also states, "If the Credit Facilities are approved and funded, Marine would require CM to provide" certain monthly financial statements and other periodic financial reporting as specified.

In setting forth the financial accommodations that Marine *would be willing to consider*, the letter also frames the proposed terms and conditions in conditional language. Marine *would consider* offering Clardy Manufacturing a revolving credit facility and term loan. The letter notes that *if the Credit Facilities are approved and funded*, then these would be the terms and conditions. The conditional or proposed nature of the financial accommodations is underscored by the bold language that follows the recitation of potential terms and conditions, where the letter states, "*Non-Binding Proposal Only: Due Diligence Required*" and "THIS PROPOSAL LETTER IS NOT A COMMITMENT TO LEND." Clardy Manufacturing argues that this language merely establishes that the letter agreement is not *yet* a firm commitment to lend, and that the commitment to lend does become binding once Clardy Manufacturing satisfies Marine's due diligence requirements. The letter does set out a number of events that would have to precede the issuance of a commitment letter obligating Marine to extend the loan to Clardy Manufacturing:

> Prior to the issuance of any commitment

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6. The letter also states, "Proceeds from the credit facilities would be used to refinance bank debt, acquire certain assets of Premier Air Parts, Inc., purchase capital stock from John Clardy Sr. and provide continuing working capital."

> letter, Marine would perform a field examination of CM, perform background investigations of CM management and shareholders, complete Marine's internal credit approval process, review financial information with CM, evaluate current appraisal information, and verify the Company's compliance with all regulations, rules, and directives of all local state, and federal regulatory and licensing agencies, including, without limitation, environmental agencies. Marine would require CM to prepare a long-range business and strategic plan, in form and substance satisfactory to Marine, including monthly forecast for the first twelve (12) months following the Closing Date, encompassing all segments of CM's business. Issuance of a commitment letter would be subject to, among other things, your completion of all of the foregoing items, to Marine's satisfaction and all of the matters discussed in this letter.

We do not find that it is reasonable, however, to read this language to suggest that a commitment letter would necessarily issue upon the completion of these enumerated items. They are neither so definite nor so all inclusive as to warrant such a conclusion. In fact, the list concludes with the statement that issuance of a commitment letter would be subject to the completion of, *among other things*, the foregoing items.[7] This

7. In addition, the letter does not spell out the details of "Marine's internal credit approval process," which must also be completed before a commitment letter will be issued.

language clearly signals that Marine's credit approval process will consist of more steps than are set out in this proposal letter.

The agreement that Clardy Manufacturing and Marine reached in this letter is clear and unambiguous. Under the heading "*Execution of Proposal Letter,*" the letter states that "Marine will undertake further efforts to assess whether CM satisfies Marine's criteria for the extension of the Credit Facilities outlined herein only if" Clardy Manufacturing signs the letter and deposits $25,000 with Marine to be applied toward the cost of conducting due diligence. In other words, Marine agreed to undertake *further efforts* towards determining Clardy Manufacturing's eligibility for a loan if the company agreed to pay for the related expense.[8] There is nothing in this agreement which suggests that Marine was binding itself to issue a commitment letter upon the successful completion of the due diligence outlined in the letter. Such a conclusion would require us, unreasonably, to believe that Marine had contracted away the normal and customary subjective decision making which enters into the final stages of a loan approval process.[9] This reading of the proposal letter is belied even by the language covering the return of the $25,000 deposit. The letter

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8. Marine eventually returned $6,840.35 to Clardy Manufacturing, which represented the unused portion of the $25,000 deposit.

9. Under Texas law, a contract's language may be construed in light of "surrounding circumstances," which includes "what the particular industry considered to be the norm or reasonable or prudent at the time." *Staff Indus., Inc. v. Hallmark Contracting, Inc.*, 846 S.W.2d 542, 546 (Tex.App. — Corpus Christi 1993, no writ). Berman acknowledged at trial that the analysis of a loan application was necessarily a somewhat subjective procedure. *See generally* DAVID A. ROBINSON, ACCOUNTS RECEIVABLE AND INVENTORY LENDING 10 (3d ed.1987) (offering guidance regarding the "sophisticated credit judgments" that bear on accounts receivable and inventory lending).

states, "If the Credit Facilities close," any remaining deposit after costs will be applied to the facilities fee. However, "If Marine declines to close the Credit Facilities," the deposit will be returned less costs. If the issuance of a commitment letter was guaranteed upon the successful completion of due diligence, Marine would have no power to *decline* to close the credit facilities.

Having considered the entire writing, we conclude that the language of the letter agreement between Clardy Manufacturing and Marine is reasonably susceptible to only one meaning. In part, the proposal letter serves to set out the terms and conditions of the credit facilities, or loans, that Marine is considering extending to Clardy Manufacturing. Beyond this, the letter also contains an agreement by Marine to undertake further efforts to assess whether Clardy Manufacturing satisfied its credit criteria by conducting due diligence as outlined in the letter. The letter does not, however, constitute a satisfaction contract. We find that the letter agreement between Clardy Manufacturing and Marine is unambiguous and does not require us to consider extrinsic evidence to determine its meaning.

The district court concluded that the letter agreement was ambiguous as to "what, if anything, was Marine obligated to do if it became satisfied with Clardy Manufacturing's demonstration of creditworthiness?" This conclusion, however, flows from the faulty assumption that the letter agreement was intended to address each and every step leading up to the issuance of the commitment letter. As we have found, the proposal letter unambiguously memorializes the agreement that Marine should undertake further due diligence as part of its effort to evaluate Clardy Manufacturing's loan application.

Appendix B

The letter agreement's failure to address what further steps Marine would undertake as part of its internal credit approval process once it had become satisfied with Clardy Manufacturing's creditworthiness does not necessarily render ambiguous the agreement to undertake due diligence. As the letter agreement did not obligate Marine to take further steps upon the successful completion of due diligence, the writing had no need to speak to this issue. While it may seem unfair to suggest that Marine was free to simply walk away following the completion of due diligence, the letter agreement's silence on this issue does not destabilize the letter's clear and unambiguous language.

Although we will not consider extrinsic evidence for the purpose of creating an ambiguity in what we perceive to be the clear meaning of the letter agreement's language, *see Universal C.I.T. Credit Corp.*, 243 S.W.2d at 157, we note that the extrinsic evidence relied on by the district court does not cast doubt on our reading of the document. Drawing on a comparison between the letter agreement and language required by Marine's credit policy manual, the district court concluded that Norvet intended to make the letter agreement sound "more binding" than the normal proposal letter. The district noted that according to Marine's policy manual, a letter of intent or a preliminary proposal "must contain language substantially in conformance with the following:"

> Please note that this letter is not a binding commitment of [borrower] or [Marine], nor does it define all of the terms and conditions of the financing, but is a framework upon which the documentation for this transaction shall be structured, and is a basis

> for further discussion and negotiation of the terms as may be appropriate. The credit shall be subject to due diligence review of the business and financial affairs of [borrower] with [borrower's] management, the approval of the proposed terms and conditions by the [Marine] credit authorities, and the execution and delivery of documentation satisfactory in form and substance to [Marine's] legal counsel.

Although the language in the policy manual is perhaps worded more pointedly than the letter agreement, we disagree with the district court that the letter agreement does not contain language substantially in conformance with this paragraph. Moreover, in contrast to the typical letter of intent contemplated by the language in Marine's policy manual, the proposal letter in this case does contain a definite agreement between the parties, namely to have further due diligence conducted as part of the credit approval process.[10]

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10. The presence of this agreement in what is otherwise a proposal letter also helps explain why the district court is mislead in its reliance on another piece of extrinsic evidence. The district court focussed on the fact that the letter agreement contained a signature line for Clardy Manufacturing with the recitation, "ACKNOWLEDGED AND AGREED TO," similar to Marine's form commitment letter which has a signature line for the borrower and the recitation, "Accepted and Agreed to." In light of the agreement between the parties in this case to have further due diligence undertaken, we do not find that the inclusion of a signature line and "agreed to" language casts any doubt on our conclusion as to the unambiguous meaning of the proposal letter.

Clardy Manufacturing also argues that evidence that approval of the

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The district court further erred by relying, at the outset, on the rule of strict construction against the drafter to hold that Marine was required to honor the "more binding" language drafted by Norvet. We note that the rule *contra proferentem* "is not one of the favored rules of construction. Indeed, it is said that it is to be resorted to only when the other rules fail." *Smith v. Davis*, 453 S.W.2d 340, 344 (Tex.App. — Fort Worth 1970, writ ref'd n.r.e.) (internal quotation marks omitted); *see also id.* (refusing to apply the rule even though there was an ambiguity in the contract). Certainly, "the rule has no application where . . . the intent of the parties is clear and a resort to the rule will defeat that intent." *Modular Technology Corp., Metal Bd. Division v. City of Lubbock*, 529 S.W.2d 273, 276 (Tex.App. — Amarillo 1975, writ ref'd n.r.e.). Accordingly, we find that the district court erred in concluding that the letter agreement was a satisfaction contract. Because there is no underlying satisfaction contract, there can be no damages for breach of that contract. Accordingly, we vacate the district court's award of damages on Clardy Manufacturing's contract claim.

III

On cross-appeal, Clardy Manufacturing contends that the

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loan was contingent upon the satisfactory completion of due diligence can be found in the required payment of the $25,000 deposit and the confidentiality clause, which, Clardy Manufacturing claims, were "intended to prevent Clardy Manufacturing from looking elsewhere." At trial, Marine's representatives acknowledged that the confidentiality clause was intended to prevent Clardy Manufacturing from "shopping" these loan terms and conditions with other banks. Even if we accept that these provisions were intended to keep Clardy Manufacturing from seeking financing elsewhere, we fail to perceive how this evidences an intent on Marine's part to enter into a satisfaction contract.

district court erred in concluding that it failed to state a claim under the Texas Deceptive Trade Practices Act. TEX.BUS. & COM. CODE.ANN. § 17.41 *et seq.* In order to state a claim under the DTPA, the plaintiff must establish that he is a "consumer" as defined by the Act. *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex.1980). The district court concluded that Clardy Manufacturing did not qualify as a "consumer" under the Act is a question of law which we review *de novo*. *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1028 (5th Cir.1991).

The Act defines "consumer" as an individual "who seeks or acquires by purchase or lease, any goods or services." TEX.BUS. & COM.CODE.ANN. § 17.45(4). Moreover, the purchased goods or services must form the basis of the complaint. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981). The DTPA defines "goods" as "tangible chattels or real property purchased or leased for use." TEX.BUS. & COM.CODE.ANN. § 17.45(1). And "services" are defined as "work, labor or service purchased or leased for use, including services furnished in connection with the sale or repair." TEX.BUS. & COM.CODE.ANN. § 17.45(2). In *Riverside*, the Texas Supreme Court has held that the extension of credit does not constitute "goods" or "services" under the Act. *Riverside*, 603 S.W.2d at 175; *see also FDIC v. Munn*, 804 F.2d 860, 863 (5th Cir.1986) (summarizing Texas law as holding that "goods" and "services" do not include intangible chattel such as stocks, money, or loans).

The court in *Riverside*, however, left open the question whether activities related to the loan transaction, such as financial counseling, could constitute "services" under the Act. *Riverside*, 603 S.W.2d at 175 n. 5. Texas courts have generally limited *Riverside*'s holding to cases where the loan was the

plaintiff's main objective and forms the sole basis of the complaint. *See Munn*, 804 F.2d at 864 (citing cases).[11] Clardy Manufacturing claims that it qualifies as a "consumer" under the Act in that it sought to purchase the "loan services" Marine provided. The loan application process, however, was never an objective of Clardy Manufacturing's separate and distinct from the credit facilities which the company hoped to obtain from Marine.[12] The sole basis of Clardy Manufacturing's complaint is the denial of the credit facilities. Accordingly, we affirm the district court's determination that Clardy Manufacturing has failed to state a claim under the Texas DTPA.

IV

Clardy Manufacturing also cross-appeals from the district court's failure to address its alternative common law claims for fraudulent misrepresentation, negligent misrepresentation, and

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11. *See, e.g., Flenniken v. Longview Bank and Trust Co.*, 661 S.W.2d 705, 708 (Tex.1983) (concluding from a series of transactions that plaintiffs sought to acquire a house, not a loan, and that this formed the basis of their complaint); *First Federal Savings & Loan Ass'n of San Antonio v. Ritenour*, 704 S.W.2d 895, 900 (Tex.App. — Corpus Christi 1986, writ ref'd n.r.e.) (concluding that the plaintiff's claim was based on the purchase of financial counseling separate from the certificate of deposit).

12. In fact, we agree with the district court that the "loan services," or the due diligence, was solely for Marine's benefit, and that Clardy Manufacturing would have gladly bypassed this step and gone straight to the issuance ot the commitment letter if permitted. Nor is Clardy Manufacturing claiming that the due diligence was not performed, or that it was performed inadequately. Rather, the company is merely complaining that Putkonen, in deciding not to recommend the loan application for approval, reached the wrong conclusion based on this due diligence.

promissory estoppel. Evidence was submitted at trial in support of each of these alternative theories of recovery. Having granted Clardy Manufacturing full recover under its contract claim, the district court declined to reach these alternative claims. If we were to remand this case, it would only remain for the district court to enter findings of fact and conclusions of law as to these alternative claims. We conclude, however, that remand in this case is unnecessary because Clardy Manufacturing's alternative claims all fail as a matter of law. *See Halbert v. City of Sherman, Texas*, 33 F.3d 526, 530 (5th Cir.1994) (declining to remand claims to district court where plaintiff would be unable to prevail even if afforded the opportunity to amend his pleadings); *Brown v. Texas A & M University*, 804 F.2d 327, 334 (5th Cir.1986) (same).

A

Under Texas law, the elements of a cause of action for negligent misrepresentation are:

> (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

Federal Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439,

442 (Tex.1991) (citing the Restatement (Second) of Torts (1977));*see also Inglish v. Union State Bank*, 911 S.W.2d 829, 837 (Tex.App. — Corpus Christi 1995, writ requested).

Clardy Manufacturing's claims of negligent or fraudulent misrepresentation are based primarily on two sets of statements by a Marine representative. As to one instance, John Clardy, Jr., testified at trial that at the Wednesday lunch meeting with Graeme McDougall, the Chairman of the Australian company Environmental Products, Norvet "stated that I would have a commitment letter by Friday or the following Monday or Tuesday."[13] McDougall testified that Norvet had said that he "expected" a letter of commitment to be issued within the next two to five days because "from Marine Midland's point of view everything looked good. The audit was good. All the other relevant documentation that had to be done looked good." John Clardy, Jr., claims that he detrimentally relied on this representation by entering into a licencing agreement with Environmental Products two days later.[14]

A claim for negligent misrepresentation under Texas law contemplates that the "false information" provided by the defendant is a misstatement of *existing* fact. *Airborne Freight Corp. v. C.R. Lee Enterprises*, 847 S.W.2d 289, 294 (Tex.App. — El Paso 1992, writ denied). "Negligent misrepresentation

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13. Berman also testified that Norvet had reported that "he had assured John Clardy, Jr., that we would be getting a commitment letter within the next two to five days."

14. We note, however, that the agreement with Environmental Products was not referenced in the letter agreement, and that Berman acknowledged at trial that it would not have made any difference with respect to the business he did with Environmental Products whether the proposed loan went through or not.

does not occur when a defendant simply makes a guess as to a future, unknown event." *Sergeant Oil & Gas Co. v. National Maintenance & Repair, Inc.*, 861 F.Supp. 1351, 1360 (S.D.Tex.1994) (applying Texas law); *see id.* (holding that defendant's representation that the barge could be loaded in eighteen to twenty-four hours was not actionable under a theory of negligent misrepresentation); *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 138 (Tex.App. — Beaumont 1993, writ denied) (holding that statements as to how long a work project would take to complete were not "false information").

In at least one case, a successful claim for negligent misrepresentation was based on a loan officer's statement that his bank had approved plaintiffs' loan. *Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d at 441-42. The facts of *Sloane*, however, were distinguished by the court in *Alpha Road v. NCNB Texas National Bank*, 879 F.Supp. 655 (N.D.Tex.1995). In *Alpha Road*, the bank officer had represented that he needed additional authority, but that the loan was a "done deal" and that it would be renewed at the end of four months. 879 F.Supp. at 665. The court in *Alpha Road* concluded that unlike the representation in *Sloane*, the bank officer's assurances referred to the bank's future performance, and were therefore not actionable under a theory of negligent misrepresentation. *Id.* The facts in this case are in accord with those in *Alpha Road*.

Clardy Manufacturing does not contend that Norvet represented that the loan had in fact been approved, or that the commitment letter had already been issued. Even if we assume that Norvet said that the commitment letter *would* issue within

two to five days, as we must,[15] rather than that he "expected" the letter to issue within this time frame, we nevertheless conclude that this statement is not actionable as a misstatement of *existing* fact. At most, Norvet's representation was a misstatement as to a *future* action by Marine.[16]

Moreover, under a claim for negligent misrepresentation, the plaintiff must prove "justifiable reliance" on the misrepresentation. *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521, 526 (5th Cir.1987) (applying Texas law). This requirement, also known as the "materiality" element, has two aspects: "the plaintiff must in fact have relied; and this reliance must have been reasonable." *Id.* In other words, "there must be a reasonable relation between the contents of the defendant's misrepresentation and the action the plaintiff took in reliance." *Id.* "The justifiableness of the reliance is judged in light of the plaintiff's intelligence and experience." *Scottish Heritable*

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15. In determining whether Clardy Manufacturing has presented sufficient evidence from which a reasonable fact finder could find in its favor on the alternative common law claims, we "must review the evidence in the light and with all reasonable inferences most favorable to" Clardy Manufacturing. *Roberts v. United New Mexico Bank at Roswell*, 14 F.3d 1076, 1078 (5th Cir.1994) (internal quotation marks omitted). "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, [judgment as a matter of law] is proper." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc). There must be a conflict in "substantial evidence" to create a jury question. *Id.* at 375.

16. As will be discussed *infra*, there is also no evidence in the record to indicate that Norvet did not believe what he said at the time he made the representation. Nor did Clardy Manufacturing present any evidence establishing that Norvet was reckless to believe, at this time, that the commitment letter would issue shortly.

Trust PLC v. Peat Marwick Main & Co., 81 F.3d 606, 615 (5th Cir. 1996). A plaintiff's reliance is unjustified when the reliance is in effect an act of negligence on the plaintiff's part. *Id.*

When viewed against all of the surrounding circumstances and the plaintiff's business experience, Clardy Manufacturing's reliance on Norvet's representation was, as a matter of law, unjustified. In other words, we find that no reasonable fact finder could conclude otherwise. John Clardy, Jr., and his advisor, Berman, knew at all times that Norvet had no credit approval authority. From the time he graduated from college in 1977, John Clardy, Jr., had been involved in managing the company his father founded, and as President of the company he had handled the task of negotiating with lenders for additional financing since 1989. Berman, aside from holding the position as President of Premier Air Parts, Inc., was also a former chairman of the board of a commercial bank, with twelve years of lending experience prior to that. Rather than waiting an additional two or three days to verify that a commitment letter did in fact issue, John Clardy, Jr., decided to enter into the licencing agreement with McDougall that Friday.[17] We find, as a matter of law, that there is no reasonable relationship between Norvet's assurances and Clardy Manufacturing's decision to enter into the licencing agreement two days later. To the extent that John Clardy, Jr., in fact relied representation, this reliance was, under the circumstances and

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17. Evidence at trial established that McDougall, who had been in the United States for two months by the time of the lunch meeting, was anxious to return home to Australia for business and personal reasons. McDougall also testified that it would have been possible to sign the contract in Australia by fax machine and teleconference, or to have signed an agreement in principle conditioned on the issuance of the commitment letter, but that he "chose, while I was here, to complete the job that I came to do."

in light of John Clardy, Jr. and Berman's business sophistication, an act of negligence.

The other set of misrepresentations underlying Clardy Manufacturing's alternative claims focuses on what the company was told regarding Marine's credit approval process. Both John Clardy, Jr., and Berman testified that Norvet told them, prior to signing the letter agreement, that the loan would be signed and approved in the Dallas office, and then shipped to Wilmington, Delaware, to be "rubber stamped," that is, reviewed for form and content. In fact, no one in the Dallas office had credit approval authority, and a loan application required two or more signatures by Marine officials before it could be approved. John Clardy, Jr., testified at trial, that he would not have entered into the letter agreement if he had known that the ultimate credit approval would have to come from an office outside Dallas.[18] We conclude, however, that no reasonable trier of fact would believe that John Clardy, Jr., *in fact* relied on Norvet's representations regarding the loan approval process.[19] In other words, no reasonable trier of fact

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18. John Clardy, Jr., testified that he felt it was important to establish a personal relationship with the people making the credit approval decision. We note that John Clardy, Jr., acknowledged that Frank Mederos was introduced at the January 7 meeting as someone from Marine's home office in Wilmington, Delaware, who would be a significant factor in the home office evaluation of the credit. Berman also acknowledged that Mederos was introduced to him as someone from the home office who would have some input into the credit package, and that Mederos told them that he would review the credit package at his home office.

19. *Cf. Brown v. Ford Motor Co.*, 479 F.2d 521, 523 (5th Cir.1973) (reversing the jury's verdict because no reasonable jury could have disbelieved witness's uncontradicted testimony as to the alleged defect).

would conclude that Clardy Manufacturing, which for several years had been unsuccessfully seeking financing from numerous lenders,[20] would not have entered into the letter agreement if Marine had made explicit the fact that final credit approval had to come from outside of Dallas.[21] Clardy Manufacturing can therefore not show that the representation was "material" to its decision to enter into the agreement. Moreover, to the extent that John Clardy, Jr., would not have

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20. In one instance, John Clardy, Jr., had traveled to Houston in an attempt to seek financing from Hong Kong Bank, an affiliate of the Hong Kong and Shanghai Banking Corporation.

21. Clardy Manufacturing also claims that it relied on Norvet's representation at these early meetings that the loan could be approved and closed as early as February 28 and as late as March 31, 1992. As discussed above, however, this statement is not actionable inasmuch as it is merely an opinion as to a future event, not a misstatement of existing fact.

In addition, Clardy Manufacturing claims that Marine failed to disclose (1) that it was in the process of changing its credit approval process in late 1991 and early 1992 from a "committee process" to an individual signature process; (2) that Marine, along with its five other regional offices, were undergoing a reorganization that began in January 1992; and (3) that Jim Ely had left the Dallas office and that Kurt Putkonen, the credit manager for the Atlanta office, had assumed Ely's responsibilities for evaluating Clardy Manufacturing's loan application. Clardy Manufacturing has failed to identify any affirmative duty on Marine's part to disclose this information to Clardy Manufacturing. *See Emerald Texas, Inc. v. Peel*, 920 S.W.2d 398, 403 (Tex.App. — Houston [1st Dist.] 1996, no writ) ("[A] failure to disclose information is not fraudulent unless one has an affirmative duty to disclose, such as where a confidential or fiduciary relationship exists."); *see also Federal Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706, 708-09 (Tex.1990) (concluding that a duty of good faith is only imposed where a "special relationship" exists marked by a shared trust or imbalance in bargaining power, and does not exist between a lender and its borrower).

entered into the agreement had he known the full extent of the credit approval process, we find that such reliance would have been, as a matter of law, unreasonable. No reasonable businessman in John Clardy, Jr., circumstances would have made such an irrational decision. Accordingly, this second set of representations will also not support a claim for negligent misrepresentation.

B

Under Texas law, to recover for fraud, the plaintiff must establish that:

> (1) a material representation was made; (2) it was false when made; (3) the speaker knew it was false, or made it recklessly without knowledge or its truth and as a positive assertion; (4) the speaker made it with the intent that it should be acted upon; and (5) the party acted in reliance and suffered injury as a result.

Roberts v. United New Mexico Bank at Roswell, 14 F.3d 1076, 1078 (5th Cir.1994). To be actionable, the misrepresentation must be "one concerning a material fact; a pure expression of opinion will not support an action for fraud." *Transportation Ins. Co. v. Faircloth,* 898 S.W.2d 269, 276 (Tex.1995). An opinion may constitute fraud, however, if the speaker knows that it is false. *Sergeant Oil & Gas Co. v. National Maintenance & Repair, Inc.,* 861 F.Supp. 1351, 1358 (S.D.Tex. 1994). "An expression of an opinion as to the happening of a future event may also constitute fraud where the speaker purports to have special knowledge of facts that will occur or exist in the future."

Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex.1983). A promise to do an act in the future, on the other hand, is fraud "only when made with the intention, design and purpose of deceiving, and with no intention of performing the act" at the time the promise was made. *Airborne Freight Corp. v. C.R. Lee Enterprises, Inc.*, 847 S.W.2d 289, 294 (Tex.App. — El Paso 1992, writ denied).

Clardy Manufacturing failed to present any evidence that at the time Norvet allegedly represented that a commitment letter would issue within two to five days: (1) that Norvet knew that his representation was false; (2) that Norvet had special knowledge of future facts bearing on the issuance of the commitment letter; or (3) that Norvet or Marine had no intention of issuing the commitment letter or approving Clardy Manufacturing's loan application. "Failure to perform, standing alone, is no evidence of the promisor's intent not to perform when the promise was made." *Id.* Clardy Manufacturing has not presented any additional circumstantial evidence which would permit a reasonable trier of fact to find that Norvet's representation to John Clardy, Jr., and McDougall was fraudulent at the time it was made. *Cf. T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex.1992) (concluding that plaintiffs had presented insufficient evidence that the bank had no intention to perform at the time its representative made the promise that bank would loan plaintiffs $50,000).

A plaintiff in a fraud action must also show that his reliance was justifiable as well as actual. *Id.* "To determine justifiability, courts inquire whether — given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud — it is

extremely unlikely that there is actual reliance on the plaintiffs part." *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014,1026 (5th Cir.1990).[22] For the same reasons set out above under Clardy Manufacturing's negligent misrepresentation claim, we also conclude that Clardy Manufacturing has failed, as a matter of law, to establish that Norvet's representations regarding the credit approval process were material to its decision to enter into the letter agreement. That is, no reasonable trier of fact could conclude that Clardy Manufacturing's reliance was actual and justifiable under the circumstances. Accordingly, neither set of alleged misrepresentations will support a claim of fraud.

C

Clardy Manufacturing's final alternative common law claim is for promissory estoppel. Under Texas law, the basic requirements of a promissory estoppel claim are: "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *English v. Fischer,* 660 S.W.2d 521, 524 (Tex.1983). Texas courts have also established a fourth and separate requirement of a "definite finding that *injustice can be avoided only by the enforcement of the promise." City of Beaumont v. Excavators & Constructors, Inc.,* 870 S.W.2d 123, 137 (Tex. App. — Beaumont 1993, writ denied) (emphasis in original). In addition, the courts have emphasized that "estoppel requires a

22. Because the justifiable reliance element of a claim for negligent misrepresentation is generally equated with contributory negligence, some courts have concluded that "justifiable reliance" in the context of fraud represents a lesser burden on the plaintiff than in the context of negligent misrepresentation. *See, e.g., Haralson,* 919 F.2d at 1025 & n. 5; *Dupuy v. Dupuy,* 551 F.2d 1005, 1018 (5th Cir.), *cert. denied,* 434 U.S. 911, 98 S.Ct. 312, 54 L.Ed.2d 197 (1977).

reasonable or *justified* reliance on the conduct or statement of the person sought to be estopped by the person seeking the benefits of the doctrine." *Traco Inc. v. Arrow Glass Co.*, 814 S.W.2d 186,190 (Tex.App. — San Antonio 1991, writ denied) (emphasis in original and internal quotation marks omitted).

The only alleged *promise* in this case is Norvet's assurance to John Clardy, Jr., and McDougall that the commitment letter would issue within the next two to five days. For the reasons set out above, we conclude as a matter of law that Clardy Manufacturing has not shown any reasonable or justified reliance on this alleged promise. *Cf. Bluebonnet Savings Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 912 (Tex.App. — Houston [1st Dist.] 1995, no writ) (holding that there was no basis to support a claim for promissory estoppel where the plaintiffs had failed to establish justifiable reliance under a claim for negligent misrepresentation). Accordingly, Clardy Manufacturing has also failed to state a claim for promissory estoppel.

V

For the foregoing reasons, we REVERSE the district court's judgment on Clardy Manufacturing's satisfaction contract claim. We AFFIRM the district court's determination that Clardy Manufacturing failed to state a claim under the Texas DTPA. Having found that there is no theory under which Clardy Manufacturing could recover, we RENDER judgment in favor of Marine.

APPENDIX C — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FILED JULY 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORTH WORTH DIVISION

ACTION NO. 4:93-CV-541-Y

CLARDY MANUFACTURING COMPANY

VS.

MARINE MIDLAND BUSINESS LOANS, INC.

AMENDED FINAL JUDGMENT

Pursuant to the opinion filed in the above-styled and numbered cause on May 19, 1995, as modified by the order issued this same day, and Federal Rule of Civil Procedure 58,

It is, hereby ORDERED, ADJUDGED, and DECREED that Plaintiff have and recover from Defendant the amount of $8,111,467, plus prejudgment interest in the amount of $691,798 and attorneys' fees in the amount of $250,000, with postjudgment interest to accrue on the total amount at a rate of 6.28 percent per annum from the date the original judgment was entered until paid. Plaintiff shall further recover from Defendant an additional $50,000 in the event of Defendant's perfection of appeal to the Fifth Circuit, an additional $25,000 in the event of Defendant's pursuit of a writ of certiorari to the Supreme Court, and an additional $50,000 in the event Defendant's writ of certiorari is granted. Costs of court shall be taxed against Defendant.

Appendix C

SO ORDERED.

SIGNED July 14, 1995.

s/ TERRY R. MEANS
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION FILED JULY 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORTH WORTH DIVISION

ACTION NO. 4:93-CV-541-Y

CLARDY MANUFACTURING COMPANY

VS.

MARINE MIDLAND BUSINESS LOANS, INC.

ORDER GRANTING MOTION TO AMEND, MODIFY, OR CORRECT JUDGMENT AND GRANTING MOTION FOR ADDITIONAL FINDINGS

Pending before the Court is Plaintiff's Motion to Amend, Modify, or Correct the Court's May 19, 1995 Final Opinion and Final Judgment, which was filed in the above-styled and numbered cause on May 30, 1995. Also pending before the Court is Plaintiff's Motion for Additional Findings and Brief in Support Thereof, which was filed on June 2. Defendant filed a joint response to these motions on June 22, and Plaintiff filed a joint reply on June 27. After consideration of the foregoing and the applicable law, the Court finds that both of Plaintiff's motions should be and are hereby GRANTED to the extent set forth in this order.

It is, therefore, ORDERED that the second sentence of the last paragraph commencing on page nine of the Final Opinion

of the Court filed herein on May 19, 1995 ("Final Opinion"), should be and is hereby MODIFIED to read as follows: "The Court therefore finds that Clardy's damages are $8,111,467.00 as of November 19, 1994."

It is further ORDERED that the Final Opinion should be and is hereby MODIFIED to include the following additional findings:

> The damages suffered by Clardy were lost profits resulting from Marine's breach of the letter agreement with Clardy. Excluding the damages suffered as a result of the loss of the EPA contract, the lost profits accrued as of: (a) September 30, 1992 are $539,034; (b) September 30, 1993 are $2,151,929; and (c) September 30, 1994 are $1,044,841. The discounted present value of lost profits accruing on September 30, 1995, 1996, and 1997, as of November 19, 1994, total $3,582,091. Clardy also suffered lost profits as a result of the loss of the EPA contract. The amount of those lost profits accrued as of: (a) September 30, 1992 are $155,700; (b) September 30, 1993 are $234,600; and (c) September 30, 1994 are $287,569. The discounted present value of the EPA contract lost profits accruing on September 30, 1995, 1996, and 1997, as of November 19, 1994, totals $155,703. Thus, after subtracting the $40,000 origination fee Clardy would have had to pay if Marine issued the commitment letter and proceeded

to closing, Clardy suffered actual damages in the total amount of $8,111,467.00 as of November 19, 1994.

The Court further finds that under Texas law, Clardy is entitled to equitable prejudgment interest. *See American Int'l Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536, 540 (5th Cir. 1987) (holding that "under Texas law an equitable award of prejudgment interest should be granted to a prevailing plaintiff in all but exceptional circumstances"); *see also Crown Cent. Petroleum Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 768 F.2d 632, 636 (5th Cir. 1985) (holding that the Texas Supreme Court's decision in *Cavnar v. Quality Control Parking, Inc.*, 696 S.W. 2d 549 (Tex. 1985), "create[s] a new prejudgment interest rule for all cases" and finding that the district court was therefore correct to award equitable prejudgment interest on unliquidated damages recovered pursuant to a contract). Clardy is entitled to prejudgment interest on those damages that accrued by the time of judgment, *see Cavnar*, 696 S.W.2d at 554, but not on the future profits that were discounted to present value at trial, *see id.* at 555-56. Prejudgment interest will be awarded at the rate of ten percent, *see id.* at 554 (holding that rate for prejudgment interest should be determined as set forth in TEX. REV. CIV.

Appendix D

STAT. ANN. art. 5069-1.05 § 2 (Vernon Supp. 1995)), compounded annually on December 31 (as was requested by Clardy in its June 2 Motion for Additional Findings). As a result, the Court finds Clardy is entitled to prejudgment interest in the amount of $691,798.00.

An amended final judgment in accordance with the Court's Final opinion, as modified by this order, will issue this same day.

SO ORDERED.

SIGNED July 14, 1995.

s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION FILED MAY 19, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ACTION NO. 4:93-CV-541-Y

CLARDY MANUFACTURING COMPANY

VS.

MARINE MIDLAND BUSINESS LOANS, INC.

FINAL JUDGMENT

Pursuant to the opinion issued this same day and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff have and recover from Defendant the amount of $8,141,467, plus attorneys' fees in the amount of $250,000, with postjudgment interest to accrue thereon at a rate of 6.28 percent per annum from the date this judgment is entered until paid. Plaintiff shall further recover from Defendant an additional $50,000 in the event of Defendant's perfection of appeal to the Fifth Circuit, an additional $25,000 in the event of Defendant's pursuit of a writ of certiorari to the Supreme Court, and an additional $50,000 in the event Defendant's writ of certiorari is granted. Costs of court shall be taxed against Defendant.

Appendix E

SO ORDERED.

SIGNED May 19, 1995.

s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION FILED MAY 19, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORTH WORTH DIVISION

CIVIL ACTION NO. 4:93-CV-541-Y

CLARDY MANUFACTURING COMPANY

VS.

MARINE MIDLAND BUSINESS LOANS, INC.

FINAL OPINION OF THE COURT

Clardy Manufacturing Company, Inc. ("Clardy"), the plaintiff in this case, is a family-owned corporation which makes and markets air conditioners for automobiles. The defendant, Marine Midland Business Loans, Inc. ("Marine"), is a wholly-owned subsidiary of Hong Kong and Shanghai Bank Group, a consortium with assets of over $300 billion. Marine is an asset-based lender whose own assets exceed eighteen billion dollars.

On January 10, 1992, Marine drafted, signed, and dispatched to Clardy, itspotential borrower, a letter agreement relating to a loan of about four million dollars. Clardy, desperate for operating capital and funding for a buyout of its principal shareholder, signed the letter agreement on January 17. Clardy contends that the letter agreement is a "satisfaction contract." Marine insists that it is nothing more than a

nonbinding, preliminary proposal. The Court agrees with Clardy.

A contract is a satisfaction contract if the performance of one party is required only upon his being satisfied with the prior performance of the other party. *See Culbertson v. Brodsky*, 788 S.W.2d 156, 157 (Tex. App. — Fort Worth 1990, writ denied). Here, Clardy insists that Marine promised to issue a commitment letter fully obligating itself to lend Clardy four million dollars if Clardy satisfied Marine's criteria for the extension of credit.

Marine strenuously objects, and not without reason, to Clardy's characterization of the letter agreement as a satisfaction contract. Marine correctly points out that the letter agreement has many conditional-sounding phrases and some direct language tending to show that Marine intended the agreement to be a preliminary proposal only. The opening paragraph recites, "You have asked Marine . . . to set forth the financial accommodations that Marine would be willing to consider. . . ." (Pl.'s Ex. 14 at 1). The words "would consider," "would require" and "would be" are scattered throughout the document. Most persuasive is the explicit language set out first as a subheading, "Non-Binding Proposal Only: Due Diligence Required," followed immediately by the all-caps advisory, "THIS PROPOSAL LETTER IS NOT A COMMITMENT TO LEND." (Pl.'s Ex. 14 at 4).

This language, much-loved by Marine, is followed, in the same and in a successive paragraph, by Clardy's favorite sentences:

> Prior to the issuance of any commitment

> letter, Marine would . . . complete Marine's internal credit approval process . . . . Marine would require [Clardy] to prepare a long-range business and strategic plan, in form and substance satisfactory to Marine. . . . *Issuance of a commitment letter would be subject to, among other things, your completion of all of the foregoing items, to Marine's satisfaction* and all of the matters discussed in this letter.
>
> If you would like Marine to undertake further efforts *to assess whether [Clardy] satisfies Marine's criteria for the extension of the Credit Facilities outlined herein*, . . . please remit to Marine the sum of $25,000. . . .
>
> . . . .
>
> Marine will undertake further efforts to assess *whether [Clardy] satisfies Marine's criteria for the extension of the Credit Facilities* outlined herein only if you return to Marine an original, signed copy of this letter, together with the Deposit on or before January 17, 1992.

(Pl.'s Ex. 14 at 4-5) (emphasis added).

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *R&P Enterprises v. LaGuarta,*

Gavrel, & Kirk, Inc., 596 S.W.2d 517, 518 (Tex. 1980). To achieve this objective, courts should examine and consider the entire writing in an effort to, harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 158 (1951). If, after applying the established rules of interpretation, a written instrument remains ambiguous, that is, reasonably susceptible to more than one meaning, extrinsic evidence is admissible to determine the true meaning of the instrument. *See R&P Enterprises*, 596 S.W.2d at 519.

The letter agreement between Clardy and Marine is an integrated, written contract signed by both parties and supported by adequate consideration. As a result, Defendant's assertion of the statute of frauds is unavailing. *See* TEX. BUS. & COMM. CODE ANN. § 26.02 (Vernon Supp. 1995). The letter agreement is also, however, ambiguous, as the Court determined early in the trial of the case when extrinsic evidence was first allowed to prove the true intent of the parties. Its ambiguity is profound on the central issue in this case: what, if anything, was Marine obligated to do if it became satisfied with Clardy's demonstration of creditworthiness?

An important aid to resolving ambiguity is the fixed rule that the agreement will be construed most strictly against the party drafting it. *See Republic Nat'l Bank v. Northwest Nat'l Bank*, 528 S.W.2d 109, 115 (Tex. 1978).

> This just and reasonable rule is grounded upon the principle that the party who prepares the contract "is responsible for ambiguities in his own expressions and has

> no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they will mean another thing more to his advantage."

Daniel v. Universal C.I.T. Credit Corp., 238 S.W.2d 727, 731 (Tex. Civ. App. — Waco) (quoting 17A C.J.S. *Contracts* § 324 (1963)), *rev'd on other grounds*, 150 Tex. 513, 243 S.W.2d 154 (1951).

The principle is especially applicable here. Marine drafted the letter agreement with an eye to inducing Clardy to borrow four million dollars from Marine and thereby to end a drought of lending activity lasting over a year. The testimony, including that of Marine's officers, compels an inference that Marine and its Dallas office personnel were hungry for and under pressure to make loans. Clardy was its best prospect in many months. There was great incentive for Marine's Dallas personnel in general, and salesman Michael Norvet in particular, to draft a letter agreement attractive to Clardy. Norvet did exactly that. In doing so Norvet strayed from the standard and mandatory language of Marine's form proposal letter. Norvet intended to make the letter agreement sound more binding than the proposal letter language required by his credit policy manual, and he succeeded. The rule of strict construction against the drafter will not allow language freeing Marine to prevail over language binding it. *See Whittington v. Cameron Compress Co.*, 268 S.W. 216, 218 (Tex. Civ. App. — Austin 1923) ("where contracts are prepared by one of the parties who chooses his own language and provides exemptions under which such party may seek to escape liability, such contracts should be construed strictly against the party who prepared them"), *aff'd*, 280 S.W.2d 527 (Tex. 1926).

Appendix F

Marine claims that the letter agreement in this case is merely a letter of intent or a preliminary proposal. According to Marine's policy manual, relevant portions of which Clardy put into evidence, such a letter "must contain language substantially in conformance with the following:

> Please note that this letter is not a binding commitment of [borrower] or [Marine], *nor does it define all of the terms and conditions of the financing, but is a framework upon which the documentation for this transaction shall be structured, and is a basis for further discussion and negotiation of the terms as may be appropriate. The credit shall be subject to* due diligence review of the business and financial affairs of [borrower] with [borrower's] management, *the approval of the proposed terms and conditions by the [Marine] credit authorities*, and the execution and delivery of documentation satisfactory in form or substance to [Marine's] legal counsel."

(Pl.'s Ex. 41, Standard Language at SL-1) (emphasis added). The underlined language would make clear even to a careless borrower that no contract to lend money is intended by its drafter. But that mandatory language is absent in the letter agreement Marine drafted for Clardy. In its place is the already-quoted satisfaction language.

Also present in the parties' letter agreement are a number of important clauses substantially the same as that found in Marine's form commitment letter as well as, significantly,

signature lines for Marine and its borrower. The form commitment letter recites, above the signature line for the borrower, "Accepted and Agreed to:" (Pl.'s Ex. 41, Form of Commitment Ltr. with Summ. of Terms at 3). The Clardy-Marine letter agreement closes with the language "ACKNOWLEDGED AND AGREED TO:," which is followed by the signature of Clardy's representative. (Pl.'s Ex. 14 at 6). At trial, Marine attempted to distinguish between the two phrases, but any distinction would be absent a difference. Significantly, Marine did not attempt to explain why a mere preliminary proposal letter would need the signature of Clardy at all.

Marine justifiably insists that the Court examine the entire writing to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *See Universal C.I.T. Credit Corp.*, 243 S.W.2d at 158. Here, the Court must harmonize and give effect to the conditional language and to the two troublesome clauses, "Non-Binding Proposal Only: Due Diligence Required," and "THIS PROPOSAL LETTER IS NOT A COMMITMENT TO LEND."

The difficulty for Marine is that neither the conditional phrases sprinkled throughout nor the two quoted clauses are necessarily inconsistent with the satisfaction language upon which Clardy relies. Marine's obligation to perform is conditioned upon its satisfaction with Clardy's performance; the conditional language is not inappropriate or contradictory. As for the two clauses, harmonized with the satisfaction language and then giving effect to all, they mean that the letter agreement is a nonbinding proposal and not a commitment to lend unless and until Clardy satisfies Marine that it meets Marine's loan criteria. Upon being satisfied, Marine is bound to

issue a commitment letter and, ultimately, to loan the money to Clardy.

The law identifies two types of satisfaction: personal (subjective) and reasonable (objective). "Where there is doubt or ambiguity, the preferred interpretation is that the contract calls for a performance which is objectively satisfactory . . . [but] 'personal satisfaction is required if the agreement leaves no doubt that it is only honest satisfaction that is meant' . . . ." John D. Calameri & Joseph M. Perillo, *Contracts*, § 11-37, at 502 (3d Ed. 1987) (quoting Restatement (Second) of Contracts § 228 cmt. a (1981)). Which satisfaction it is — personal or reasonable — may be determined by the character of the performance contracted for and the nature of the tests by which it is customarily valued. If those tests are scientific, mechanical, or uniform, performance is measured by those objective standards, and if the promisor refuses the proffered performance, the correctness of his decision and the adequacy of his grounds are subject to review. *Communications Transmission, Inc. v. Tristar Communications, Inc.*, 798 F. Supp 406, 409 (W.D.Tex. 1992) (quoting 3A Corbin, *Corbin on Contracts*, § 648, at 107 (1960 ed.)). If those tests involve taste, fancy, or personal judgment "the promisor is the sole judge of the quality of the work, and his right to reject, if in good faith, is absolute. . . ." Calameri and Perillo, *supra*, at 503.

Here, even if the letter agreement were ambiguous as to how Clardy's performance was to be evaluated, the law would favor an objective standard. But there is no ambiguity. Instead, it is clear that the tests by which Clardy's performance was to be judged did not involve artistic taste or personal fancy. They involved factors that were identifiable and quantifiable. "Although not always as clear and objective as many scientific

tests, the analysis of the financial condition of an operation involves the use of objective data and analyses." *Tristar*, 798 F. Supp. at 409. Marine admits as much by its development of its credit policy guide and sector/division guidelines, setting out the tests by which it would judge the creditworthiness of its loan applicants.

The final question to be answered here, then, is whether Clardy met those objective standards. If it did, Marine became legally obligated to issue its letter of commitment and make the loan. That issue is settled by Marine's own testimony and papers. On April 16, 1992, David E. Boyd, Marine's Dallas officer in charge of reviewing Clardy's performance, signed a certification as follows: "I confirm that the terms of this lending conform with the Credit Policy Guide and Sector/Division guidelines." (Pl.'s Ex. 25 at 15). A clearer admission of objective satisfaction is hardto imagine.

The Supreme Court of Texas and at least one Texas court of appeals have issued opinions that seem to confuse the requirement that, on the one hand, subjective or personal satisfaction must be exercised in good faith with, on the other hand, the "reasonableness" or objective test's requirement that the performance satisfy a reasonable person. *See Black Lake Pipe Line v. Union Constr. Co.*, 538 S.W.2d 80, 88-89 (Tex. 1976); *Cranetex, Inc. v. Precision Crane & Rigging, Inc.*, 760 S.W.2d 298, 301-302 (Tex. App. — Texarkana, 1988 writ denied); *see also Tristar*, 798 F. Supp. at 409. However, even applying the confused language of the Texas courts to this case, the result is the same. Kurt Putkonen, Marine's administrative vice-president and territory manager in Atlanta who denied the loan after receiving certification from David Boyd that the loan conformed with Marine's policy guide, did not act in

"objective" good faith. He was poorly informed about Clardy and made his decision primarily on intuition. That certainly would have been his right and perhaps even his duty in Marine's usual loan review process conducted pursuant to Marine's guidelines. Here, however, Marine drafted a letter agreement — in contravention of its mandatory form language — which obligated it to loan four million dollars to Clardy upon its satisfaction with Clardy's creditworthiness, not upon Marine's sole discretion nor upon its intuition that credit ought to be denied. The Court finds that Clardy's performance would have satisfied a reasonable person and that Marine's denial of the loan therefore was objectively unreasonable and not in good faith. Marine consequently breached its contract with Clardy and is liable for damages.

Marine offered no evidence to contradict Clardy's lay and expert testimony on damages. The Court therefore finds that Clardy's damages are $8,141,467 as of November 19, 1994. The Court disallows Clardy's recovery of the portion of its deposit Marine kept to reimburse itself for expenses. The Court's duty is to place Clardy in the position it would have been in but for Marine's breach. *See McCulley Fine Arts Gallery, Inc. v. "X" Partners*, 860 S.W.2d 473, 478 (Tex. App. — El Paso 1993, no writ); *McAllen State Bank v. Linbeck Constr. Corp.*, 695 S.W.2d 10, 18 (Tex. App. — Corpus Christi 1985, writ ref'd n.r.e.). Had Marine loaned Clardy the money, it would not have owed Clardy any refund of its escrow. Likewise, had Marine issued the commitment letter and proceeded to closing, Clardy would have owed Marine a $40,000 origination fee. The Court has deducted that sum as well from the total of Clardy's damages proven at trial.

Under Texas law, Clardy is entitled to reasonable attorneys

fees due to its recovery for breach of a written contract. *See* TEX. CIV. PRAC. & REM. CODE ANN. §38.001(8) (Vernon 1986). The Court finds from the evidence adduced at trial that Clardy should recover from Marine the sum of $250,000 for its attorney's fees incurred through the date of this order, an additional $50,000 in the event of Marine's perfection of appeal to the Fifth Circuit, an additional $25,000 in the event of Marine's pursuit of a writ of certiorari to the Supreme Court, and an additional $50,000 in the event Marine's writ of certiorari is granted.

Clardy's First Amended Original Complaint also alleges unconscionable conduct and misrepresentations by Marine in violation of the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), fraudulent misrepresentation, negligent misrepresentation, and promissory estoppel. However, according to Clardy's response to Marine's motion for summary judgment and its counsel's representations at trial, those causes of action were pleaded "as alternative bases of recovery in the event that the Court does not accept the breach of contract cause of action." (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 10). Since the Court has granted Clardy recovery on its breach of contract claim, it will recognize Clardy's choice of recovery and will not, except for Clardy's DTPA claim, address Clardy's alternative theories of liability. The DTPA claim will be addressed in view of the Act's express provision that its remedies are cumulative of all others. *See* TEX. BUS. & COMM. CODE ANN. § 17.43 (Vernon 1987).

Clardy alleges that Marine violated the DTPA by making false and misleading representations and by engaging in an unconscionable course of conduct, all to Clardy's detriment. *See* TEX. Bus. & COM. CODE ANN. § 17.41, *et seq.* (Vernon

1987). Before Clardy may recover under the DTPA, it must be, in the transaction between itself and Marine, a "consumer" as that term is defined in the DTPA and caselaw construing it. To be a consumer, Clardy must have sought or acquired goods or services by purchase or lease. *See id.* § 17.45. Clardy claims in its First Amended Original Complaint that it paid $25,000 to Marine for "loan services." Those alleged services are not identified in Clardy's complaint, but at trial Clardy listed audit services and appraisal services; advice on inventory systems, the form of its financial reports, and corporate structure; and daily monitoring of Clardy's credit line, and the like.

As Marine pointed out in its pleadings and motions, and during trial, these "services" were not to be performed for Clardy's benefit, but for Marine's. Marine agreed to perform these services in order that Marine might evaluate Clardy's creditworthiness. Clardy was to receive no direct benefit from them; its sole benefit would be the funding of the loan upon Marine's satisfaction that Clardy met its loan criteria. Even if these alleged services were for Clardy's benefit, Clardy would not be made a consumer by that fact alone. When a transaction's central objective is the acquisition of an intangible, not a "good" as defined by § 17.45 of the DTPA, Texas law requires a plaintiff to establish that a collateral service was an objective of the transaction and not merely incidental. *See F.D.I.C. v. Munn,* 804 F.2d 860, 863 (5th Cir. 1986). Here, the central objective of the Clardy-Marine transaction was a loan — an intangible. *See Riverside Nat'l Bank v. Lewis,* 603 S.W.2d 169, 174 (Tex. 1980). The collateral services Clardy now claims to have sought were at best incidental to its central and somewhat desperate goal: money. Clardy would have gladly accepted the money without the promise of any services and would have signed a note on a napkin if Marine had been willing.

Clardy insists that it is also a consumer as to Marine because it sought to purchase certain assets of Premier Air Parts, Inc. Setting aside whether Clardy actually sought Premier's assets (tangible goods) rather than its corporate stock (an intangible), Clardy is still not a consumer here. Even if the goods Clardy sought were Premier's assets, those assets do not form the basis for Clardy's DTPA complaint. This is the second requirement in the Texas Supreme Court's two-prong test for determining consumer status. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981).

In *Central Texas Hardware v. First City, Texas — Bryan, N.A.*, 810 S.W. 2d 234 (Tex. App. — Houston [14th Dist.] 1991, writ denied), a case involving facts similar to those in this case, the plaintiffs sought a loan to purchase inventory for their retail hardware business. After stringing the plaintiffs along, much as Marine did Clardy, the bank denied the loan. When Plaintiffs' business promptly failed, they sued the bank under the DTPA. The Texas Court of Appeals for the 14th District, sitting in Houston, held that the basis of the plaintiffs' complaint was their failure to get the loan, not the inventory items which they would have purchased with the loan proceeds. Having flunked the second prong of the test, the plaintiffs were not consumers. Their DTPA claim, thus found to be without foundation, collapsed.

In *Walker v. F.D.I.C.*, 970 F.2d 114, 123 (5th Cir. 1992), the Fifth Circuit noted that the Texas courts of appeal are "obviously split" on the issue of what forms the basis of a complaint in a loan transaction, in view of the divergent holdings in *Security Bank v. Dalton*, 803 S.W.2d 443 (Tex. App. — Fort Worth 1991, writ denied) and *Central Texas Hardware*. In *Security Bank v. Dalton* the Fort Worth court of

appeals decided the plaintiffs *were* consumers under the DTPA because they sought loans for the specific purpose of erecting a funeral home building and purchasing inventory and other equipment. The Fifth Circuit sided with the Houston court in *Central Texas Hardware*, saying, "[b]ecause *Riverside* has yet to be expressly overruled, we believe the court of appeals in Houston has taken the wisest and most logical course." *Walker*, 970 F.2d at 123. After the Fifth Circuit decided *Walker* in 1992, the Amarillo court of appeals weighed in on the Houston court's side of the issue in *First State Bank v. McCordie*, 861 S.W.2d 284 Tex. App. — Amarillo 1993, nowrit).

This Court takes guidance from and agrees with the Fifth Circuit. The DTPA protects consumers — and only consumers — as defined by the Act and caselaw construing it. Clardy is not a consumer under the DTPA; consequently, it shall take nothing by way of its claims against Marine under the Act.

SO ORDERED.

SIGNED May 19, 1995.

s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX G — EXCERPTED TRANSCRIPT OF PROCEEDINGS

[Commencing at page 121, Vol. 2]

Direct – Wiseman/Clardy

* * *

Q. Did your father find Clardy Manufacturing Company?

A. Yes, he did.

* * *

[122] * * *

Q. Was he a pioneer in developing what we refer to as the aftermarket air conditioner in that particular industry?

A. A pioneer of automotive air conditioning would be a more correct term, because there was no factory air at the time to speak of.

* * *

[Vol. 1, 27] Direct – Wiseman/Berman

* * *

Q. Can you tell the Court the difference between an asset base lender and a bank in making a loan?

A. Yes. An asset base lender loans primarily on collateral or a collateral basis. A commercial bank loans primarily on a [28] cash flow basis.

Appendix G

* * *

[Vol. 2, 123] Direct – Wiseman/Clardy

* * *

Q. What is your title?

A. I'm president and C.E.O.

Q. Now, your father recently passed away; is that correct?

A. That is correct.

* * *

Q. And what was your father's position with Clardy Manufacturing Company at his death?

A. He was chairman of the board.

* * *

[Vol. 5, 65] Direct – DeYoung/Norvet

* * *

Q. Would you state your full name for the record, please, sir?

A. Michael Timothy Norvet.

* * *

Appendix G

Q. There was a period of time, was there not, sir, when you were employed by Marine Midland Business Loans, Inc.?

A. Yes.

* * *

Q. Could you tell the Court what your position was at Marine Midland during that tenure?

[66] A. Senior business development officer.

* * *

[Vol. 5, 135] Direct – DeYoung/Putkonen

* * *

In 1992, would you tell the court what your position was with Marine Midland Business Loans?

A. At that time I was administrative vice-president and territory manager, and I had responsibility — I got [136] responsibility in January of '92 in that position with responsibility over our Atlanta office, our Dallas office, our Kansas City office, and our Chicago office.

* * *

Q. What was the occasion for your being in Dallas in the middle of January?

A. It had been announced earlier that week, is my recollection,

that I would be taking over these new responsibilities. So it was really my first visit to Dallas to meet the people here in Dallas.

* * *

[Vol. 2, 6] Direct – Wiseman/Berman

* * *

Q. Did you learn at some point that Jim Ely was no longer at Marine Midland?

A. Yes, we did.

Q. Can you tell me when you learned that and how?

A. I learned it from or heard it from Michael Norvet, . . .

* * *

[7] * * *

Q. Did he tell you what happened to Mr. Ely?

A. He told me that Mr. Ely had been terminated, . . .

* * *

Q. What did he tell you was going to happen now with the process?

* * *

A. . . . He told me now that there is a gentleman in Atlanta, Georgia that is going to be involved in the transaction, and he needs to take a look at it and he temporarily was going to be replacing Jim Ely. . . .

* * *

[8] * * *

Q. Who did that person from Atlanta, Georgia turn out to be?

A. Kurt Putkonen.

* * *

[Vol. 1, 30] Direct – Wiseman/Berman

* * *

Q. And did Clardy and Premier continue to send financials when Mr. Norvet would contact them and request information?

A. Yes. We both did.

Q. At some point in time, did the minimum loan amount change?

A. Yes, it did.

Q. When was that?

A. Approximately September of 1991.

Q. And how did you find out about the loan amount changing?

A. From Michael Norvet.

* * *

Q. Did he tell you why he changed or why Marine Midland lowered its minimum loan amount to $3 million?

A. He told me why it had changed was because they had only made, I think, three loans in the whole entire Marine Midland Business Credit Division nationwide, and they had not made any [31] loans in the Dallas office. So they appeared interested in looking at loans under $5 million now.

Q. To attract new business?

A. Yes.

* * *

[Vol. 1, 46] Direct – Wiseman/Berman

* * *

Q. . . . What did Mr. Norvet represent to you and Mr. Clardy, Jr. about where the approval [47] of the loan that you all were seeking would take place?

A. We were told that the approval from the loan would take place in Dallas, Texas. That the loan would be approved by the senior credit manager, or the credit manager.

* * *

Appendix G

[Vol. 2, 34] Cross – DeYoung/Berman

* * *

Q. And didn't Mr. Ely at that time tell you that it was very important for Mr. Mederos to meet you and Mr. Clardy because Mr. Mederos was from the home office and would, obviously, be involved in reviewing the credit?

A. I believe it was Michael Norvet that told us that.

* * *

A. We were always told that the loan would be approved in Dallas by the credit manager, and it would be — I think Mr. Norvet referred to it — shipped up to the East, or Wilmington, Delaware, to be rubber stamped. And what he said there — every time he said rubber stamped, he would say reviewed for form and content.

* * *

[Vol. 5, 138] Direct – DeYoung/Putkonen

* * *

Q. Would you describe for the Court what your role with respect to evaluating the Clardy application would have been at that time?

A. Well, after the PCREF, which would have been the credit write-up was completed, I would have been the next person who would have reviewed the credit prior to sending it, and I would

have been a recommender of the credit, prior to sending it up [139] to people in Buffalo, who would be the next line of people who would look at the credit.

Q. At that point in time, was there anyone in the Dallas office who had any authority to approve this credit?

A. No, there was not.

* * *

Q. Would you briefly describe for the Court what your authority with respect to this credit was?

A. I would only have been a person who would have been recommending the credit to — in this particular case, there were two other people who would have — or one other recommender, which was a gentleman named Vince Mancuso, who was my boss, and Steve Ames that would have been the individual signing to approve the credit.

* * *

[Vol. 2, 9] Direct – Wiseman/Burman

* * *

Q. At some point in time did you and John Clardy, Jr. learn that there was more than one signature required before this loan could get approved according to Marine Midland?

A. Yes, we did.

Q. Can you tell me when you found that out?

* * *

A. Excuse me, the end of March, yes.

* * *

[Vol. 2, 59] Redirect – Liser/Berman

* * *

Q. Since this litigation has been filed and discovery has gone forward, have you since learned that in January of '92, Marine Midland was involved in a signature process, which would require the signature only of someone from Dallas, the signature of Kurt Putkonen in Atlanta, and then two more signatures in Buffalo, New York?

A. We have learned that since.

* * *

Q. Would that have made a difference —

A. Yes, it would.

Q. — in Clardy paying 25,000 to secure the services to get this loan if you had been told about this signature process?

A. It would have made a big difference.

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Q. Would you have signed the agreement?

A. No.

* * *

[Vol. 3, 64] Recross – DeYoung/Clardy

* * *

A. Because I think in any loan transaction, as much as the facts and figures have to be present, that I still think in lending, there is a lot of credence put on the relationship developed between people, between a bank and a company. And someone to be in Atlanta, Georgia that I did not know, I would feel pretty cold about that person casting a judgment on me without having met me early in the going. . . .

* * *

[Vol. 1, 38] Direct – Wiseman/Berman

Q. How did Norvet learn about E.P.A.?

A. From John Clardy and myself.

* * *

Q. If you could tell the court what E.P.A. — the kind of products that E.P.A. had and was marketing?

A. E.P.A. manufactured what is known as freon recovery and recycling equipment. They manufactured it in Australia and sold it wordwide.

Appendix G

* * *

[39] Q. Can you tell us briefly, first of all, what that transaction was or supposed to be?

A. We were — John Clardy and myself were bidders for supplying freon recovery and recycling equipment to Volkswagen to Mexico in their plant in Pueblo, Mexico.

* * *

[Vol 2, 73] Direct – Wiseman/McDougall

* * *

Q. Did you have discussions with Clardy Manufacturing about [74] becoming — in addition to storing your property — I should say your inventory there — about becoming a licensee for E.P.A.?

A. Yes. We had extensive discussions with Clardy Manufacturing about that, and it resulted in us reaching a broad general agreement on the way both parties wanted to move forward.

* * *

[Vol. 2, 63] Redirect – Liser/Berman

* * *

Q. Was the E.P.A. agreement discussed with Michael Norvet?

A. Yes, it was, several times.

Q. At length, in fact?

A. At length on several occasions.

Q. Was it the anticipation that the agreement with E.P.A. would be signed if, and only if, you were going to get the loan from Marine Midland?

A. It would be considered if, and only if, we were going to get the loan from Marine Midland.

* * *

[Vol. 2, 80] Direct – Wiseman/McDougall

* * *

Q. If I can bring your attention — direct your attention to the day of March 11th of 1992, there has been testimony about a luncheon meeting among yourself, John Clardy, Jr., and a Michael Norvet. Do you recall that?

A. I do.

* * *

[Vol. 2, 70] Direct – Wiseman/McDougall

* * *

Q. Would you please state your full name for the court?

Appendix G

A. Graeme Robert McDougall.

* * *

Q. What is your title or position at E.P.A.?

A. I'm chairman and chief executive officer.

* * *

[81] Q. Did you ask to speak to any of the persons from Marine Midland or want to meet with them?

A. I believe I did. . . .

* * *

At that stage, John Clardy rang Michael Norvet at Marine Midland and arranged for the three of us to have lunch.

* * *

[Vol. 1, 70] Direct – Wiseman/Berman

* * *

Q. Did you come to learn about a lunch meeting among John Clardy, Graeme McDougall, and Norvet that led to the signing of this agreement?

A. Yes.

Q. Who did you learn it from?

A. Michael Norvet.

* * *

[71] Q. What did he say?

A. He told me that he had met with John Clardy and Graeme McDougall with regard to Clardy Manufacturing signing this contract. And he told me that he assured John Clardy, Jr. that we would be getting a commitment letter within the next two to five days, which would have been approximately March 13th to the 17th and that he had no problem — his exact words were, I have no problem with Johnny signing the contract.

* * *

[Vol. 2, 82] Direct –Wiseman/McDougall

* * *

A. The discussions at lunch centered on the progress of the Marine Midland processing of the loan and the fact that Michael Norvet said that from Marine Midland's point of view everything looked good. The audit was good. All the other relevant documentation that had to be done all looked good. He said that he expected a letter of commitment to be issued by Friday of that week, . . .

* * *

Appendix G

[Vol. 2, 150] Direct – Wiseman/Clardy

* * *

Q. What do you recall Mr. Norvet representing to you, on behalf of Clardy Manufacturing Company, as to when a commitment letter would be issued?

A. He told us that he would have a commitment letter issued as early as Friday of that week or at the latest Monday or Tuesday of the following week.

Q. Did you rely upon this representation in signing the E.P.A. contract on March 13?

A. We relied solely on that representation to execute that [151] agreement.

Q. Would you, on behalf of Clardy Manufacturing, have signed the agreement but for this representation of Mr. Norvet?

A. No, we would not have signed it.

* * *

[Vol. 2, 84] Direct – Wiseman/McDougall

A. Later that day, I rang my fellow director in Australia and I also rang our financiers, which was Ceito (phonetic) and Company. They are a Japanese international trading house. Their regional office is in Sidney. I rang them and I spoke to them. I conveyed to them the essence of what Mr. Norvet had said at lunch, and we all agreed that when a bank makes that sort of a

statement, that we're entitled to believe it. And that on that basis, we should go ahead as a company and sign the contract with Clardy Manufacturing.

Q. And was the contract signed?

A. Yes. . . .

* * *

[Vol. 5, 147] Cross – Liser/Putkonen

* * *

Q. One of the things that businessmen want to know is the loan approval process; isn't that true?

A. Yes, generally.

* * *

Q. That's important, isn't it, for a business who is making a decision as to whom they are going to allow to loan money to them?

A. Yes. Certainly, that is something that everyone is very interested in knowing what the process is, yes.

Q. And in order for a business to make a proper and informed decision, they have to get some good information about the loan process, do they not?

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A. That's one thing that many business people do want to know very definitively how that words, yes.

Q. Would it surprise you to know that in this case it was important to know to John Clardy to know how the loan approval [148] process would work?

A. No. That wouldn't surprise me.

* * *

[Vol. 2, 84] Direct – Wiseman/McDougall

* * *

Q. Did the commitment come as was represented by Mr. Norvet?

A. Could you ask that again, please?

Q. Did the commitment to fund come as was represented by Mr. Norvet at the luncheon?

A. I believe not.

Q. Did this cause problems in Clardy Manufacturing's meeting of the payments — I guess it caused E.P.A. problems, too. Did this cause problems with regard to the payment schedule of the contract?

A. Yes. Clardy was unable to fulfill the contract with us because they didn't have the funds with which to do it. That, in turn, impacted on E.P.A. as we had commitments to our financiers and to our suppliers which we wanted to meet, were obliged to meet, but were unable to do so.

Appendix G

[85] Q. What action did E.P.A. make with regards to the fact that Clardy was unable to meet the payment schedule as outlined in the license agreement?

* * *

. . . We resolved to help Clardy by giving him time where we could.

That was one side. On the other side, we were still under a lot of pressure from our financiers to meet our obligations to them. For us, for E.P.A., that was a very, very difficult and trying time. We were several times in danger of going into default on our loan agreements.

[Vol. 2, 161] Direct – Wiseman/Clardy

* * *

Q. I would like to turn your attention now to the impact on [162] Clardy Manufacturing Company not getting the funding as contracted for on the operations of the company. . . .

* * *

Q. What about the E.P.A. payment schedule as outlined in the license agreement?

A. We were unable to meet it.

* * *

Q. (By Mr. Wiseman) What about the marketing of E.P.A.

products. Can you tell me what has happened there with regards to Clardy Manufacturing Company?

A. Well, the lack of funding for that loan had a fairly devastating effect on our ability to operate the part of the [163] contract where we were to sell the product and build it up. . . . So, therefore, it really had a drastic negative effect on our ability to market the product.

* * *

Q. But you have some competition now with regard to sell those products?

* * *

Q. And that competition is E.P.A. itself, is it not?

A. That's correct.

Q. Mr. Graeme McDougall now has, as he testified, a plant, and I guess you are all competitors for the same product; is that correct?

A. That's correct. I lost basically a contract to Nappa Parts, the largest independent parts distributor in America, and I lost it to Environmental Products.

* * *

Appendix G

[Vol. 1, 71] Direct-Wiseman/Berman

A. . . . which would have been the 11th of March, 1992 . . . . I had tried to contact him earlier that day and he was out of the office having this meeting, and he called me upon his return back to his office in Dallas.

Q. What did he say?

A. He told me that he had met with John Clardy and Graeme McDougall with regard to Clardy Manufacturing signing this contract. And he told me that he assured John Clardy, Jr. that we would be getting a commitment letter within the next two to five days, which would have been approximately March 13th to the 17th and that he had no problem — his exact words were, I have no problem with Johnny signing the contract.

* * *

[Vol. 5, 86] Direct - DeYoung/Norvet

Q. Then you sent the letter to him on or about that date?

A. That's correct.

Q. And if you could take a look at the letter very briefly, Mr. Norvet. In the middle paragraph there, it says: As of the above date, which is March 27, the real estate appraisals have not been completed. Is that correct?

A. That's correct.

Q. Was that your understanding that they had not been completed?

A. That's correct.

Q. And is the completion of the real estate appraisals an important function in the underwriting of the loan?

A. Critical.

Q. And you say that, therefore Marine is not in the position to approve the transaction. Are those your words, sir?

A. Yes.

Q. You go on to say that you anticipate that the appraisals and other matters will be resolved in the near future, do you not?

A. Yes.

Q. And you certainly hoped that they would be, didn't you?

A. Absolutely.

Q. Because you wanted Marine to make the loan; isn't that correct?

A. Absolutely.

APPENDIX H — CASES REFERRED TO IN FOOTNOTE 2 OF PETITION

United States v. Carty, 993 F.2d 1005, 1008-1009 (1st Cir. 1993)

In re The Bible Speaks, 869 F.2d 628, 630 (1st Cir. 1989)

Hormel Foods Corp. v. Jim Henson Prod., Inc., 73 F.3d 497, 502 (2nd Cir. 1996)

Huntington Branch, N.A.A.C.P. v. Huntington, N.Y., 961 F.2d 1048, 1055 (2nd Cir. 1992)

Complaint of Nautilus Motor Tanker Co., Ltd., 85 F.3d 105, 116 (3rd Cir. 1996)

Zilch v. Reid, 36 F.3d 317, 321-322 (3rd Cir. 1994)

United States v. Brown, 821 F.2d 986, 989 (4th Cir. 1987)

Bruhwiler v. Univ. of Tenn., 859 F.2d 419, 421 (6th Cir. 1988)

Maher v. Harris Trust & Savings Bank, 75 F.3d 1182, 1189 (7th Cir. 1996)

Winchester Packaging, Inc. v. Mobil Chem. Co., 14 F.3d 316, 319 (7th Cir. 1994)

Doe v. First Nat'l Bank of Chicago, 865 F.2d 864, 874 (7th Cir. 1989)

Favors v. Fisher, 13 F.3d 1235, 1238 (8th Cir. 1994)

Wilson v. Lambert, 789 F.2d 656, 658 (8th Cir. 1986)

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Spain v. Rushen, 883 F.2d 712, 717 (9th Cir. 1989)

Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 825-826 (10th Cir. 1995)

Thompson v. Rockwell Inter. Corp., 811 F.2d 1345, 1350-1351 (10th Cir. 1987)

Bulloch v. United States, 763 F.2d 1115, 1122 (10th Cir. 1985)

Caban-Wheeler v. Elsea, 71 F.3d 837, 843 (11th Cir. 1996)

Walker v. NationsBank of Florida, N.A., 53 F.3d 1548, 1557 (11th Cir. 1995)

United States v. Armendaris, 790 F.2d 864 (11th Cir. 1986)

Ramey v. Bowsher, 915 F.2d 731, 735 (D.C. Cir. 1990)

APPENDIX I — RULE 29.1 LISTING

Subsidiaries of Marine Midland Business Loans, Inc.:

Marmid Life Insurance Company
1414 W. Bradway Road, Suite 100
Tempe, Arizona 85282

Educational Funding Services
27127 Calle Arroyo
San Juan Capistrano, California 92675

Marine Midland Leasing Corp.
1 Marine Midland Center
Buffalo, New York 14203

Recovery Remedies, Inc.
1 Marine Midland Center
Buffalo, New York 14203

Delaware Credit Corp.
One Marine Midland Center
Buffalo, New York 14203

One Main Street Inc.
One Marine Midland Center
Buffalo, New York 14203

Marine Midland Services Corp.
One Marine Midland Center
Buffalo, New York 14203

Marine Midland Payment Services, Inc.
One Marine Midland Center
Buffalo, New York 14203

Appendix I

HSBC Asset Management Americas
HSBC Asset Management
250 Park Avenue, 3rd Floor
New York, New York 10177

Marine Midland Bank
Hang Seng Bank, USA
One Marine Midland Center
Buffalo, New York 14203

Marine Midland Auto Lease Corp.
One Marine Midland Center
Buffalo, New York 14203

Marine Aircraft Leasing Corp.
One Marine Midland Center
Buffalo, New York 14203

Marine Midland Realty Cr. Corp.
One Marine Midland Center
Buffalo, New York 14203

Marmid Aircraft Leasing Corp.
One Marine Midland Center
Buffalo, New York 14203

Marine Midland Realty Cr. Corp.
One Marine Midland Center
Buffalo, New York 14203

Marine Midland Securities, Inc.
140 Broadway, Floor 10
New York, New York 10005

Appendix 1

Marine Midland Mortgage Corp.
One Marine Midland Center
Buffalo, New York 14203

HSBC Business Loans Inc.
Marine Midland Business Loans
One Marine Midland Center
Buffalo, New York 14203